Supreme Court, U.S.
FILED

(1) 94 971 NOV 29 1994

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

October Term, 1994

In The Matter of The Custody of
S.E.G., A.L.W., and V.M.G.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

WALLING & BERG, P.A.
Wright S. Walling
Counsel of Record
Jody Ollyver DeSmidt
Gary A. Debele
701 Fourth Avenue South
Suite 650
Minneapolis, MN 55415-1606
(612) 340-1150

BRIGGS & MORGAN, P.A.
Scott G. Knudson
Sally A. Scoggin
332 Minnesota Street
#W 2200
St. Paul, MN 55101
(612) 223-6571

Counsel for Petitioners
Eugene and Carol Campbell

1994 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

113 pp

QUESTIONS PRESENTED

1. Whether Congress intended that, in considering whether "good cause to the contrary" exists under the Indian Child Welfare Act, 25 U.S.C. §1915(a), to depart from the adoptive preferences of §1915(a), courts are to be limited exclusively to the interpretive regulations of the Bureau of Indian Affairs, or may courts consider such factors as whether adoption outside the preferences would be "in the best interests of the children" or whether extraordinary emotional needs exist for permanence that could only be met by adoption outside the preferences?

2. Whether Congress intended in the Indian Child Welfare Act, 25 U.S.C. §1915(a), that possible permanent foster care with an Indian should be preferred over adoption by a non-Indian family, especially where the best interests of the children favored such adoption, and their extraordinary emotional needs for permanence could only be met through adoption with the non-Indian family?

LIST OF PARTIES

Carol and Eugene Campbell, Petitioners

Leech Lake Band of Chippewa Indians, Respondents

Diane White, Guardian ad Litem, Respondent

Minnesota Department of Human Services, Respondent

Beltrami County Social Services, Respondent

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. THE DECISION OF THE MINNESOTA SUPREME COURT RAISES IMPORTANT QUESTIONS CONCERNING THE APPLICATION OF § 1915(a) OF THE ICWA FOR WHICH THIS COURT SHOULD GRANT A WRIT OF CERTIORARI 9

II. THE DECISION OF THE MINNESOTA SUPREME COURT IS IN CONFLICT WITH OTHER STATE COURT DECISIONS IN ITS TREATMENT OF GOOD CAUSE TO DEVIATE FROM THE INDIAN CHILD WELFARE ACT PREFERENCES AND THE ROLE OF ADOPTION UNDER THE INDIAN CHILD WELFARE ACT 17

CONCLUSION 21

TABLE OF AUTHORITIES

Cases:

In Matter of the Appeal in Maricopa County Juvenile Court No. A-25525, 136 Ariz. 528, 667 P.2d 228 (Ct. App. 1983).....20

In re Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988) cert. denied, 490 U.S. 1069 (1989).....13, 15, 19

In re Interest of Bird Head, 213 Neb. 741, 331 N.W.2d 785 (1983).....13, 19

In re the Interest of C.W., 239 Neb. 817, 479 N.W.2d 105, 118 (1992).....19

In the Interest of J.R.H. and M.J.H., 358 N.W.2d 311 (Iowa 1984).....19

In the Matter of N.L., 754 P.2d 863 (Okl. 1988).....19

In the Matter of the Adoption of F.H., 851 P.2d 1361 (Alaska 1993).....12, 18

In the Matter of the Adoption of M., 66 Wash. App. 475, 832 P.2d 518 (1992).....12, 18

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).....9, 10, 15

The Adoption of N.P.S., 868 P.2d 934 (Alaska 1994).....13

Statutes:

25 U.S.C. §1902 (1988) 10

25 U.S.C. §1915(a) (1988) 6-14, 16, 17, 19, 20

25. U.S.C. §1915(b) (1988) 8, 11, 12, 14

28 U.S.C. §1257(a) (1988) 2

Miscellaneous:

Bureau of Indian Affairs Guidelines, 44 Fed. Reg. 67,538, 67,594 (1979) 6, 15

H.R. Rep. No. 1386, 95th Cong., 2d Sess. 23 (1978), reprinted in 1978 U.S.C.C.A.N., 44 Fed. Reg. at 67,584 (citing S. Rep. No. 597, 95th Cong., 1st Sess. 17 (1977)) 9

Indian Child Welfare Program, Hearings before the Subcommittee on Interior and Insular Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 45 (1974) 15

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

In the Matter of the Custody of S.E.G., A.L.W. and V.M.G.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT
OF THE STATE OF MINNESOTA

Petitioners Eugene and Carol Campbell respectfully pray that the Court issue a Writ of Certiorari to review the opinion of the Supreme Court of the State of Minnesota filed in this proceeding on August 31, 1994. The Minnesota Supreme Court entered judgment in this matter on October 11, 1994.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Minnesota is reported at 521 N.W.2d 357 (Minn. 1994), and is reprinted in the Appendix hereto at page A-57, infra.

The opinion of the Court of Appeals of the State of Minnesota in the above-captioned matter is reported at 507 N.W.2d 872 (Minn. Ct. App. 1993), and is reprinted in the Appendix hereto at page A-19, infra.

The decision of the District Court of the State of Minnesota in this matter (Judge John P. Smith), rendered May 20, 1993, has not been reported. It is reprinted in the Appendix hereto at page A-1, infra.

JURISDICTION

This proceeding involves the efforts of Eugene and Carol Campbell to adopt three Indian children. Because the children are enrolled members of the Leech Lake Band of Chippewa, the Indian Child Welfare Act of 1978, 25 U.S.C. §1901, et seq., (hereinafter "ICWA"), governed the proceedings in the state court. The Minnesota Supreme Court issued its decision on August 31, 1994, and no motion for a rehearing was filed. Judgment was entered on October 11, 1994. Petitioners filed a motion for a stay of all adoption proceedings which the Minnesota Supreme Court directed be filed with the state district court. That court set a hearing on their request for November 28, 1994. Appendix at A-78 to A-84. This Court has jurisdiction to consider this petition under 28 U.S.C. §1257(a).

STATUTE INVOLVED

Indian Child Welfare Act, 25 U.S.C. §1915 (1988).

§ 1915. Placement of Indian Children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under state law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting

which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with -

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

STATEMENT OF THE CASE

This case is about three young children, S.E.G., A.L.W., and V.M.G., ages 7 to 10. Like their biological mother, the children are enrolled members of the Leech Lake Band of Chippewa (hereinafter "Tribe"), whose reservation is in Northern Minnesota. The children all have the same father, who is Caucasian. The state court terminated all parental rights in December 1991. After serving as their foster parents, the Campbells have been trying to adopt these children. Appendix at A-2.

Throughout their lives, these children have suffered from abuse, neglect and impermanence. The State of Minnesota

terminated the rights of the parents because of their abuse and neglect. For years, these children have been shuttled from foster home to foster home and from school to school. To date these children have been in fifteen different placements. Appendix at A-2 to A-5. The children have not been allowed to remain in one place for any extended period, often moving without their clothing, personal effects or even medical information. They have been physically abused, likely sexually abused, and they have sustained serious psychological harm and learning disabilities. Appendix at A-2 to A-5. Unsurprisingly, these children have an extraordinary need for permanence in their lives.

During the time that the children were with the Campbells, they did remarkably well. Their educational advances were great and they did better than anyone expected both behaviorally and educationally. Both S.E.G. and A.L.W. progressed remarkably within the school system, and the behavioral difficulties and problems subsided greatly with the stability and permanency of the children within one home. Appendix at A-6 to A-7.

The Campbells, who live near the Leech Lake Reservation, sought to adopt these three children in November of 1992. After a thorough, but fruitless and unsuccessful, search by county, state and tribal agencies for possible relatives or other ICWA-preferred homes to adopt these children, the Campbells petitioned the Beltrami County District Court to adopt these three children. At the hearing, which lasted six days, the district court heard from twenty-three witnesses, including some qualified as experts under ICWA who supported the Campbells.

The trial court applied factors (ii) and (iii) of the Bureau of Indian Affairs Guidelines (as restated in the Minnesota Department of Human Services Social Services Manual) and concluded that there was "good cause" under §1915(a) of the ICWA to deviate from the adoption placement preferences in the Act because these children had "extraordinary physical and emotional needs" and because of the "unavailability of any suitable families for adoption" that met the preference criteria.

Furthermore, the trial court concluded the "best interests" of the children required "immediate placement" with the Campbells. Appendix at A-9 to A-10; A-15 to A-18. The Campbells were also committed to strive to maintain a connection between the children and their nearby Tribe. Appendix at A-7 to A-8.

Notwithstanding the Campbell's efforts to adopt, the Tribe had been unsuccessfully seeking to recruit an adoptive home for the children from August of 1990 until the start of trial in March 1993. The trial court specifically found that at the time of trial and in the foreseeable future there was no Indian family willing to adopt the children after a diligent search. Appendix at A-14, A-16. The trial court also found that the children had extraordinary emotional and educational needs. Appendix at A-4 to A-5. One of the children had special educational needs, had emotional difficulties, was suspected to have been a victim of sexual or physical abuse, and had a need for therapy for emotional problems and social adjustments. Another child had behavioral problems and a need for a structured behavioral program, and had emotional difficulties resulting from neglect and instability. The third child had behavioral problems, including destructive acting out, severe emotional disturbance, and was suspected of having been a victim of sexual or physical abuse and had a need for therapy. Appendix at A-5.

The trial court concluded that the children had an extraordinary need for permanence and stability resulting from multiple placements, neglect, and changes in family and school environments. The trial court further observed that while the present emotional, cultural, educational, and physical needs of the children were being met in the temporary Indian foster home placement, the critical need for permanence was not being met. Expert testimony, according to the trial court, indicated a need for permanent placement immediately and for the duration of the children's childhood and adolescence. Appendix at A-5 to A-6. This testimony and conclusions of the court were further supported by the Guardian ad Litem for the children, herself an

Indian and a enrolled member of the Leech Lake Band of Chippewa, who also conducted a detailed investigation. Appendix at A-8.

The Tribe appealed the decision to the Minnesota Court of Appeals, which affirmed the district court in a decision issued on November 16, 1993. Reviewing the ICWA, the court of appeals found that "good cause" to depart from the adoptive preferences of 1915(a) had to be shown in the trial court by clear and convincing evidence, and that a finding by the trial court that clear and convincing evidence existed would be overturned only if there was an abuse of discretion by the trial court in determining the existence of good cause. Appendix at A-32 to A-34. As to what justifies good cause, the court of appeals ruled that both the interpretative guidelines of the Bureau of Indian Affairs ("BIA"), 44 Fed. Reg. 67,538, 67,594 (1979)[1] and the decisions of other state courts may be considered, including the best interests of the children. Appendix at A-35 to A-38.

Because the Tribe argued that the needs of the children could be met by providing specialized services to the foster parent, the court of appeals also addressed the children's need for permanence. The court held that a need for permanence may be considered in determining whether a child had extraordinary emotional needs, which is one of the criteria in the BIA Guidelines for departing from the statutory adoptive preferences. Appendix at A-46. The court of appeals found that clear and convincing evidence supported the finding of the trial court that

---

[1] The BIA Guidelines state that for purposes of adoptive placement, a determination of "good cause" not to follow the order of preference in the Act shall be based on one or more of the following considerations: (1) request of the biological parents of the child when the child is of sufficient age; (2) the extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness; and (3) the unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria. BIA Guidelines, F(3); 44 Fed. Reg. 67,583, 67,594 (1979).

good cause existed to depart from the preferences set forth in §1915(a). Appendix at A-48.

On discretionary review, the Minnesota Supreme Court reversed the court of appeals and the district court in an opinion filed August 31, 1994. The supreme court departed from the statutory scheme, and the decisions of courts of other states, in refusing to find that a placement outside the three preference provisions of §1915(a) could be based on the best interests of the child. Instead, the supreme court held that "good cause" to depart from the preference provisions of §1915 could be based only on one of the factors described in the BIA guidelines. Appendix at A-71. As to the need for permanence, the state supreme court, while applying the same standard of review as the court of appeals applied, held that the need of these children for permanence could conceivably be met by permanent foster care, and not adoption. Appendix at A-74. Because the trial court had improperly assumed that the extraordinary emotional needs of the children for permanence could only be met through adoption, without considering permanent foster care, the court reversed the trial court's findings as a matter of law.

In post-decisional proceedings, the Campbells have moved for a stay of all adoption proceedings pending decision on this petition. See Appendix at A-78 to A-84. A.C., the Indian foster parent who had the children at the time of trial and who was cited by the Minnesota Supreme Court as the best placement for these children, has moved out of state and the children are in yet another foster home. Appendix at A-81. A.C. herself testified she was not available as a permanent foster care provider, nor were any other permanent foster care providers available at the time of trial. Appendix at A-7, A-16 to A-17, A-45 to A-46. The Campbells, who still seek to adopt these children, petition this court for a Writ of Certiorari that this Court may review denial of that opportunity.

REASONS FOR GRANTING THE WRIT

This dispute involves efforts by white foster parents to adopt three Indian siblings. Until this matter was before the Minnesota Supreme Court, no Indian relatives or other Indian families had stepped forward with petitions to adopt these children or even to express a willingness to provide permanent foster care. Only the Campbells have offered to provide these children with a permanent home.

In determining that good cause did not exist under §1915(a) because permanent foster care within the ICWA preferences had not been considered, the Minnesota Supreme Court effectively read "good cause" out of the statutory provision that governs adoptive proceedings under the ICWA. This conclusion overlooks the express language applying §1915(a) to adoptive, not foster care, placements. Foster care is specifically addressed in §1915(b), and nothing in the text of §1915(a) indicates that foster care within the preferences precludes adoption outside the preferences. Moreover, the supreme court substituted a theoretical possibility of foster care placement for a family qualified and ready to adopt.[2] Nothing in the statute authorizes the rejection of a family where the best interests and extraordinary emotional needs support adoption and only a theoretical future placement in permanent foster care within the preferences exists.

In enacting the ICWA, Congress struck a careful balance between the interests of Indian tribes in preserving their heritage and culture and the needs of the child in any particular case. The statute was drafted to give courts flexibility in each particular adoption proceeding.[3] In the decision below, the court limited a

---

[2] In this case, there was no permanent foster care available. Appendix at A-7, A-16 to A-17, A-45 to A-46.

[3] The legislative history of the Act clearly indicates that the use of the term "good cause" was designed to provide state courts with "flexibility" in determining the disposition of a placement proceeding involving an Indian child. While the Act establishes a federal policy that, where possible, Indian

finding of good cause to the factors set forth in the interpretative regulations of the BIA and nothing else, and read into §1915(a) a condition that adoption outside the preferences could not be considered if permanent foster care is available. No other court considering whether good cause exists under §1915(a) has ever held that only the BIA definition could be used, or that permanent foster care is preferred over adoption by a non-Indian family.

This court has addressed the ICWA only once and on an unrelated issue. See Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989). Placement decisions affecting Indian children throughout the country will be affected by the decision below. Accordingly, the court should grant the Writ to address this important and recurring issue that affects the lives and welfare of Indian children in need of adoption and to resolve the conflict between the decision below and that of several other state supreme courts construing §1915(a) of the ICWA.

I. THE DECISION OF THE MINNESOTA SUPREME COURT RAISES IMPORTANT QUESTIONS CONCERNING THE APPLICATION OF § 1915(a) FOR WHICH THIS COURT SHOULD GRANT A WRIT OF CERTIORARI.

The decision by the Minnesota Supreme Court in this matter raises issues at the very heart of the ICWA. Central to the decision below is its discussion of what constitutes "good cause" to depart from the preferences found in §1915(a) of the ICWA and whether adoption outside of the preferences can ever be preferred over permanent foster care placements with Indian

---

children should remain in the Indian community, it should "not be read as precluding the placement of an Indian child with a non-Indian family." H.R. Rep. No. 1386, 95th Cong., 2d Sess. 23 (1978), reprinted in 1978 U.S.C.C.A.N., 44 Fed. Reg. at 67,584 (citing S. Rep. No. 597, 95th Cong., 1st Sess. 17 (1977)).

families. This Court has stated that the "good cause to the contrary" language in §1915(a) is the "most important substantive requirement imposed on state courts." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36-37 (1989).

In passing the Indian Child Welfare Act of 1978, Congress stated its dual purpose as being:

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes and the operation of child and family service programs.

25 U.S.C. §1902 (1988). In revealing the purpose and complex balance of interests underlying the ICWA, this Court has observed that its purpose is to protect the individual rights of Indian children as Indians and the rights of the Indian community and tribe. Mississippi Choctaw Band of Indians v. Holyfield, 490 U.S. 30, 37 (1989). While recognizing that tribal interests had not been given proper weight, Congress expressly provided for consideration of the child's interests in § 1915(a).

Congress set out the balance of competing interests of child and tribe that should be used in adoption proceedings in section 1915(a) of the ICWA, which provides as follows:

(a) Adoptive placements; preferences

> In any adoptive placement of an Indian child under state law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

25 U.S.C. §1915(a) (1988).

While a similar balancing is provided for in foster care placements, Congress dealt separately with foster care in §1915(b) which reads:

> (b) Foster care or preadoptive placements; criteria; preferences
>
> Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with -
>
> (i) a member of the Indian child's extended family;
>
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
>
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

25 U.S.C. §1915(b) (1988). In no place in §1915(a) did Congress provide for consideration of permanent foster care as a preferred alternative to adoption.

In both of these provisions, Congress provided that good cause may exist in any one case to depart from its stated preferences. Congress did so because the very purpose of the good cause analysis set forth by the ICWA in §1915(a) or §1915(b) is to provide the court with an option for allowing placement outside of the ICWA preferences if that is in the best interests of a child and no preferred homes are available. The ICWA, moreover, specifically provides for adoption; had Congress intended that an Indian child could never be adopted by a non-Indian family when permanent foster care could conceivably be available, it would have and could have specifically limited the language in the statute. The absence in §1915(a) of any reference to licensed or approved foster care homes found in §1915(b) makes that conclusion clear.

The ICWA itself does not define the term "good cause" and thus, the courts are forced to look to other sources for guidance. The Department of the Interior, through the BIA, has issued guidelines (BIA Guidelines) to assist courts in applying the Act and the "good cause" exception in Indian Child custody proceedings.[4] Additional guidance is also to be found in case law from other states. The theme of the legislative history and case law is that courts have discretion in determining "good cause" and that it is critical that good cause includes consideration of the children's best interests.[5]

---

[4] See footnote 1, supra.

[5] See, e.g., In the Matter of the Adoption of F.H., 851 P.2d 1361, 1363-64 (Alaska 1993) (whether there is "good cause" to deviate from the placement preferences depends on many factors including, but not necessarily limited to, the best interests of the child, wishes of the parents, suitability of persons preferred for placement, and the child's ties to the tribe); In the Matter of the Adoption of M., 66 Wash. App. 475, 832 P.2d 518, 522 (1992) (discretion must be exercised in light of many factors, including the best interests of the child, wishes of the biological parents, suitability of the persons preferred for placement, the child's ties to the tribe and the child's ability to make any cultural adjustments necessitated by a particular placement); In re

Confirmation of this fact can be found by an analysis of other cases across the country permitting adoption in ICWA cases. For example, in The Adoption of N.P.S., 868 P.2d 934 (Alaska 1994) the Alaska Supreme Court affirmed a trial court's adoption decision to place a child for adoption with a non-Indian versus placement with the child's maternal grandmother where placement for adoption with the non-Indian would better meet the child's emotional needs than adoption by his grandmother. 868 P.2d at 938. Likewise, the Indiana Supreme Court in In the Matter of Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988), cert. denied, 490 U.S. 1069 (1989), affirmed the adoptive placement of an Indian child by a non-Indian couple. The Indiana court upheld the trial court's finding that the adoption of the child by the adoptive parents was in the best interests of the child in that the adoptive parents would provide a stable and consistent environment and removal from them at that time would be traumatic and cause serious emotional harm to the child. The court concluded that adoptive placement preferences, including established Tribal preferences, were not binding under the facts of the case. 525 N.E.2d at 308.

These cases confirm that adoption outside the preferences is clearly established by the Act. Any holding to the contrary is not possible under ICWA and flies in the face of the statutory reference to allowing a court to find "good cause" to the contrary to allow such placement to occur. 25 U.S.C. §1915(a) (1988). Such a conclusion renders the "good cause" language ineffective and contrary to the intent of Congress.

Here, the trial court and the court of appeals both followed this precedent and found that there was "good cause" to deviate from the ICWA preferences and to allow the three children to be adopted by the white foster parents. These children had been in

---

Interest of Bird Head, 213 Neb. 741, 331 N.W.2d 785, 791 (1983) (even though the Act may alter the focus of the best interests analysis, the Act does not change the cardinal rule that the best interests of the child are paramount).

more than fifteen foster care placements, there was no suitable Indian relative or family available or willing to adopt at the time, and detailed findings were made indicating the children's special need for permanence.

The Minnesota Supreme Court, however, stated that it believed that a finding of good cause cannot be based simply on a determination that placement outside of the preferences would be in the child's best interests. In support of this, the Minnesota Supreme Court noted that state courts are part of the problem that ICWA was intended to remedy, and it cites its own Task Force on Racial Bias in the Judicial System to suggest that insensitivity to minority cultures remains a problem in child welfare cases. The court reached the conclusion that "it therefore seems 'most improbable' that Congress intended to allow state courts to find good cause whenever they determine that a placement outside the preferences of §1915 was in the Indian child's best interests." Appendix at A-71.

Ultimately, the Minnesota Supreme Court concluded that a determination that good cause exists to avoid the placement preferences of ICWA must only be based upon a finding of one of the factors in the BIA Guidelines. The Minnesota Supreme Court acknowledged that "the need for permanence" may be an extraordinary emotional need, but did so reluctantly: "it does not seem that a need for permanence or stability cannot be considered in determining whether good cause exists in a particular case." Appendix at A-72.

This elevation of the BIA Guidelines by the Minnesota Supreme Court to an exclusive and absolute mandate to the "good cause" analysis subverts the plain language and hierarchy of §1915(a) and (b) which distinguishes between adoption and foster care. Further, the decision below is contrary to the language of the Guidelines themselves and the clear statements of

their non-binding nature.[6] The Minnesota Supreme Court has in effect turned an administrative regulation into a statute.

The Minnesota Supreme Court has taken a fundamentally new approach to this issue and states that the best interests of a child are not to be the primary consideration, but rather, the interests of the Indian Tribe is to take precedence over the needs and best interests of the individual child. The Minnesota Supreme Court is saying that with Indian children, even if they have the same need for permanence as other children, that need is subservient to the Tribe's interests.[7] While the concerns over bias

---

[6] The Guidelines themselves state that they are not regulations and are not intended to have binding legislative effect. Rather, following the guidelines will help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters. Administrative interpretations of statutory terms are given important but not controlling significance. BIA Guidelines, Introduction, 44 Fed. Reg. 67,583, 67,584 (1979). See, Appendix at A-36 n.2. See also, In re Adoption of T.R.M., 525 N.E.2d 298, 307 (Ind. 1988) ("guidelines are helpful, but neither controlling nor binding upon state proceedings"), cert. denied, 490 U.S. 1069 (1989).

[7] To the contrary, when discussing the legislative history of the ICWA, this Court cited Congressional testimony from 1974, citing in particular, Dr. Joseph Westermeyer of the University of Minnesota. Mississippi Choctaw, 490 U.S. at 33 n 1. Much of the testimony surrounding passage of the ICWA discussed special needs of Indian children, including permanency. Dr. Westermeyer testified that most of the Indian children who had trouble were those in foster care, rather than those who were adopted, and that foster children suffered from "chronic insecurity, free floating anxiety, [and] panic reactions," with these problems rarely showing up before adolescence. Indian Child Welfare Program, Hearings before the Subcommittee on Interior and Insular Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess. 45 (hereinafter "1974 Hearings").

William Byler, Executive Director, Association of Indian Affairs, raised serious concern that 70% of foster placements in some states were of Indian children, where only 8% of the adoptions involved Indian children. 1974 Hearings at 24. Child psychiatrists Drs. Carl Mindell and Alan Gurwitt observed that to be torn away from a setting and to be placed in one home after another and to never have any sense of permanence does not provide trust and security; one of the common phenomenon of foster children of any

in state courts was recognized by Congress, there is no indication anywhere in the ICWA statutes and regulations, nor in other appellate cases across the country, that Congress intended in the ICWA to do away with the best interests analysis. As expressly stated in §1902, Congress had both the best interests of the child and the interests of the tribes in mind in drafting §1915. To balance these possibly conflicting demands, Congress structured the statute so that it provides preferences that courts must consider in conjunction with good cause to the contrary, such as the child's best interests.

In §1915(a), the ICWA specifically provides for and anticipates that adoption of Indian children will occur and sets forth a basis by which the preference for placement of an Indian child outside an Indian home can occur. By its decision, the Minnesota court will deny these Indian children the permanency that they so desperately need. As long as permanent foster care, when none was available here, must also be considered a preference over adoption outside the express preference scheme, few or no adoptions will occur outside the preferences. The end result for Indian children is that they will now languish in foster care, being moved at the whim of the agency overseeing their placement. To allow this to occur to any child is an outrage. To say that such action has been blessed by Congress is to ignore the plain language of the ICWA.

The Minnesota Supreme Court's decision in this case makes adoption to meet extraordinary needs for an Indian child a practical impossibility. The Minnesota court's decision has broad ranging impact for all Indian children in Minnesota and throughout the country. States with significant Indian populations, such as North and South Dakota, Alaska, Oklahoma,

---

ethnic group is the constant sense of not knowing where they will be and how long they will be there – something that is painful and upsetting to any child. 1974 Hearings at 56. Dr. Mindell concluded that the only reason to intrude into the family is for the best interests of the child. 1974 Hearings at 58.

Washington, Nebraska, New Mexico, and Arizona, among others, may likely follow Minnesota's lead in its erroneous interpretation of the ICWA to prohibit adoption of Indian children by non-Indians when the child could conceivably remain in "permanent" foster care with an Indian foster parent. Clarification of the law is desperately needed to protect the hundreds or thousands of children who are affected by this statute.

II. THE DECISION OF THE MINNESOTA SUPREME COURT IS IN CONFLICT WITH OTHER STATE COURT DECISIONS IN ITS TREATMENT OF GOOD CAUSE TO DEVIATE FROM THE INDIAN CHILD WELFARE ACT PREFERENCES AND THE ROLE OF ADOPTION UNDER THE INDIAN CHILD WELFARE ACT.

As indicated, the Minnesota Supreme Court in its decision has stated that good cause to deviate from the ICWA preferences does not include the best interests analysis of the individual child, nor is the need for permanence to be considered a special need of the child when considering good cause to deviate from the adoptive preferences at §1915(a). And, in imparting the concept of permanent foster care analysis into §1915(a), which concerns adoptive proceedings, the Minnesota court has also raised significant question as to whether any adoptive placements may occur outside the three stated preferences in §1915(a) of the ICWA. The current Minnesota Supreme Court decision considering "good cause" to deviate from the ICWA preferences places Minnesota directly in conflict with several other states addressing this issue and in interpreting this significant federal statute.

In the decision below the Minnesota Supreme Court stated that a finding of "good cause" cannot be based simply on a determination that placement outside the preferences would be in the child's best interests. The Minnesota Supreme Court also

questioned whether the need for permanence is an extraordinary need as contemplated by the BIA Guidelines. This decision is in stark contrast with other cases across the country that have addressed the issues of best interests and permanence in the good cause analysis to deviate from an ICWA preference.

In, for example, In the Matter of the Adoption of F.H., 851 P.2d 1361 (Alaska 1993), the Alaska Supreme Court was faced with a dispute where a non-Indian couple sought to adopt an Indian child. The child had also been in multiple foster home placements. The good cause analysis by the trial court included the strong and consistent preference of the biological mother for the adoption, the bond between the foster mother and the child, the uncertainty of the child's future if the adoption were not allowed, and the possibility of the child continuing to be exposed to her Native American heritage. 851 P.2d at 1363. Like other courts, and contrary to the Minnesota court's decision, the Alaska Supreme Court held that the BIA Guidelines did not have a binding effect; rather, courts are to look to them for guidance, but the factors are not exhaustive. 851 P.2d at 1364. Most important, the Alaska Supreme Court specifically acknowledged the child's need for a permanent placement as a special need. 851 P.2d at 1365.

Similarly, in In the Matter of the Adoption of M., 66 Wash. App. 47, 832 P.2d 518 (1992), foster parents of an Indian child filed a petition for adoption. In addressing the good cause analysis, the Washington appellate court stated that good cause is a matter of discretion and discretion had to be exercised in light of many factors. The court went on to state that factors a court may consider – but were not required – were the best interests of the child, the wishes of the biological parents, the suitability of persons preferred for placement, the child's ties to the Tribe, and the child's ability to make any cultural adjustments necessitated by a particular adjustment. The Washington appellate court noted that Congress used the term "good cause" in order to provide

state courts with some flexibility in determining the placement of an Indian child. 832 P.2nd at 522.

The Nebraska Supreme Court also indicated the significant role that permanency and stability have for a special needs child. The court held in In re the Interest of C.W., 239 Neb. 817, 479 N.W.2d 105, 118 (1992) that the trauma of disturbing a mentally handicapped child's seven-year bond with a foster family may indeed constitute good cause where experts agree that Indian children need stability. And, in the case of In re the Interest of Bird Head, 213 Neb. 741, 331 N.W.2d 785 (1983), the Nebraska Supreme Court held that the ICWA did not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus. The court noted that the legislative history of ICWA stated explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. 331 N.W.2d at 791.

The Iowa Supreme Court in In the Interest of J.R.H. and M.J.H., 358 N.W.2d 311, 317, 321 (Iowa 1984), stated that the welfare and best interests of the children are paramount and the standard of "absence of good cause to the contrary" may include consideration of the cultural adjustments that children who have not lived in an Indian environment would have to make and their ability to make those adjustments. Similarly, the Oklahoma Supreme Court stated in In the Matter of N.L., 754 P.2d 863, 870 (Okl. 1988), that a finding of good cause to the contrary is predicated upon the court's consideration of the placement categories specified in ICWA, but a court should also consider whether "the good cause" exception in §1915 is met by the child's best interests.

Finally, the Indiana Supreme Court stated in In re Adoption of T.R.M., 525 N.E.2d 298, 310-11 (Ind. 1988), cert. denied, 490 U.S. 1069 (1989) that the Indian child's removal from adoptive white foster parents would be traumatic and cause serious emotional harm to the child; "good cause" is not defined for

purposes of §1915 and the legislative history states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child.[8]

The Minnesota Supreme Court in this decision is irreconcilably in conflict with numerous other appellate court decisions across the nation in terms of the role of the best interests of the child and a child's special need for permanence in making placements under the ICWA.[9] While the Minnesota Supreme Court acknowledges the BIA Guidelines as interpretive regulations are not binding, the court held those stated factors were controlling as to what "good cause" means. In so doing, the court below eliminated the discretion Congress gave to trial courts to determine whether good cause exists to deviate from the preferences in §1915(a). The Minnesota Supreme Court, unlike courts of other states, has ruled that it is inappropriate to use best interests analysis or permanency to approve a departure from the preference scheme of the ICWA. Other state courts view the best

---

[8] For instance, the Arizona Supreme Court held that it is the child's best interests which are a primary concern in adoption proceedings and referred to the Congressional declaration of policy behind the ICWA as emphasizing that the first interest Congress sought to protect was that of Indian children. In Matter of the Appeal in Maricopa County Juvenile Court No. A-25525, 136 Ariz. 528, 667 P.2d 228, 234 (Ct. App. 1983). The Arizona court notes that it was patently clear that Congress envisioned situations in which the child's best interests would override tribal or family interests; the preferences for placement were only to be followed absent "good cause to the contrary." 667 P.2d 234.

[9] The Minnesota Supreme Court's decision is also a misguided use of the powers of a reviewing court. The Minnesota court mischaracterized trial testimony, particularly that of experts; it wrongfully interjected itself into the role of the trier of fact in assessing the credibility of witnesses and weighing the evidence; and, it erroneously relies on information outside the scope of the record at trial. It did so to justify the result. The questions raised by its erroneous construction of §1915(a) of the ICWA are the issues on which this Court's review is sought.

interests and permanency standards as more universal considerations for all children. The Minnesota Supreme Court is clearly in conflict with the uniform case law of how best interests and permanency are to be considered in this important federal statute affecting placement of Indian children across the nation.

There are no other state courts that have interpreted ICWA to state that conceivable long-term foster care is preferred over permanent adoption. If the Minnesota Supreme Court is correct in its analysis of ICWA, then adoption becomes practically unavailable to Indian children in any situation where there are no relatives or Indian non-relatives available to adopt and permanent foster care, however remote a possibility, will preclude adoption. Clearly, had Congress intended this result it would have so stated in the Act. Not only does the Act not reflect such a conclusion but neither does the legislative history of the Act reflect that it was the intent of Congress to prohibit any form of an adoption of an Indian by a non-Indian.

CONCLUSION

Fifteen foster care placements are too many for any child much less these children. In denying the Campbells the opportunity to meet the best interests of S.E.G., A.L.W., and V.M.G., the Minnesota court effectively destroyed the carefully drafted legislative scheme whereby Congress gave to courts significant flexibility to consider the special needs of Indian children for permanence and their best interests, while balancing those with tribal interests. The Minnesota court has also wrongfully elevated the role of foster care placement above permanent adoptive placement, an action clearly not contemplated by Congress and one which will have enormous negative repercussions for Indian children across the nation. The Minnesota court's decision is out of step and in conflict with other appellate cases across the country where courts have applied "good cause" to deviate from the ICWA placement preferences.

Given the needs of these children, the Court should correct the error below and resolve the conflict now.

Thus, for the reasons stated, this Court should grant the requested Petition for the Writ of Certiorari and review this decision of the Minnesota Supreme Court.

Dated: November 29, 1994

WALLING & BERG, P.A.

Wright S. Walling (#114030)
Counsel of Record
Jody Ollyver DeSmidt (#14339X)
Gary A. Debele (#187458)
701 Fourth Avenue South
Suite 650
Minneapolis, MN 55415-1606
(612) 340-1150
Attorneys for Petitioners
Eugene and Carol Campbell

BRIGGS & MORGAN, P.A.

Scott G. Knudson (#141987)
Sally A. Scoggin (#98358)
332 Minnesota Street
#W 2200
St. Paul, MN 55101
(612) 223-6571
Attorneys for Petitioners
Eugene and Carol Campbell

APPENDIX

Minnesota District Court Opinion with attached Memorandum A-1

Opinion of the Minnesota Court of Appeals A-19

Opinion of the Minnesota Supreme Court A-57

Notice of Motion and Motion for Stay pending Petition to the United States Supreme Court A-78

Affidavit of Carol Campbell A-80

Affidavit of Gary A. Debele A-83

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF BELTRAMI NINTH JUDICIAL DISTRICT

In the Matter of the Custody of:	)	
	)	
Sierra E. Graham,	)	
Amber L. Whipple,	)	FILE NO. F8-92-1383
and Velvet M. Graham	)	
_____	)	
	)	
In the Matter of the Petition of	)	
	)	FILE NO. F8-92-50552
Eugene C. Campbell, and his wife,	)	
Carol E. Campbell, to adopt	)	
	)	
SIERRA E. GRAHAM,	)	
AMBER L. WHIPPLE,	)	
AND VELVET M. GRAHAM.	)	
_____	)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
ORDER AND MEMORANDUM

The above-entitled matter came on for trial before the undersigned Judge of the District Court at the Beltrami County Courthouse, Bemidji, Minnesota, on March 30, March 31, April 1, April 2, April 6 and April 9, 1993. The Petitioners, Eugene C. Campbell and Carol E. Campbell were represented by Mr. Wright S. Walling, Attorney at Law, Suite 650, 701 Fourth Avenue South, Minneapolis, Minnesota. The

Leech Lake Reservation was represented by Ms. Anita P. Fineday, Attorney at Law, Route 3, P.O. Box 100, Cass Lake, Minnesota. Ms. Shari R. Schluchter, Assistant Beltrami County Attorney, 207 Fourth Street, P.O. Box 1653, Bemidji, Minnesota, appeared on behalf of Beltrami County and the Minnesota Department of Human Services.

Based upon all of the files, records and proceedings, the Court makes the following:

FINDINGS OF FACT

1. Sierra Graham, a Native American child and an enrolled member of the Leech Lake Band of Chippewa Indians, was born on March 15, 1984.

2. Amber Whipple, a Native American child and an enrolled member of the Leech Lake Band of Chippewa Indians, was born on July 20, 1985.

3. Velvet Graham, a Native American child and an enrolled member of the Leech Lake Band of Chippewa Indians, was born on November 27, 1987.

4. The children's biological mother, Alice Whipple, is of Native American descent. The children's biological father is Terry Graham who is Caucasian.

5. The parental rights to all three of the children were terminated in Cass County, Minnesota, on December 4, 1991.

6. The children have been subjected to numerous placements during their young lives as follows:

a. Amber was placed at the Algers' foster home on January 22, 1986.

b. In September of 1986 Sierra and Amber were placed in the home of their uncle, Robert Jordain.

c. They were returned to their parents on December 30, 1986.

d. In April of 1987 the children's birth parents were married and left Minnesota with the children, even though they were under a Court order not to leave the state with the children.

e. Upon their return to Minnesota, Sierra and Amber lived with their maternal grandparent.

f. Following Velvet's birth in November of 1987, she did not reside with her parents. The children were placed at the Henry and Veda Harrison foster home on February 26, 1988.

g. Velvet was placed in the Raines, foster home on March 28, 1988; Amber and Sierra were placed at the Raines' foster home on April 13, 1988.

h. Due to sexual acting out by the children, the foster parents asked to have the children removed. The prior foster home had also asked to have the children removed because they were too active.

i. The children were moved to the Warner foster home on February 22, 1989, where they stayed until October 1990. They were abruptly moved from that home as a result of allegations that the children were being sexually abused. The allegation was cleared but the foster home did not feel that they could care

for the children because of the children's special needs.

j. On October 16, 1990, the children were placed at the Lyons, foster home in Bemidji, Minnesota. Due to a dissolution they were moved to the home of their uncle, Robert Jordain. The move was abrupt and without adequate preparation for the change.

k. Sierra Graham was placed in the Campbell PATH foster home on April 8, 1991, when the Jordains were unable to care for the children. Amber Whipple and Velvet Graham were placed in the Landis' foster home.

l. When the Landis' foster home asked to be relieved of the children, the children were placed in the home of the Petitioners in August of 1991.

m. On January 29, 1992, the children were placed in the pre-adoptive home of Larry and Betty Laveau of Cloquet, Minnesota. Larry Laveau is Caucasian and Betty Laveau is 1/16 Chippewa and enrolled with the Fond du Lac Band of the Minnesota Chippewa Tribe. The move to the Laveau home was with little preparation and without prior overnight visits to their home.

n. Sierra, Amber and Velvet resided at the Laveau home for nine days and then were returned to the Campbell home.

o. On October 8, 1992, the children were removed from the Campbell home and placed in a Native American foster home in Minneapolis.

p. That foster home asked to be relieved of their care and the children were moved to their present foster home in the Angelique Coffey home where they have resided since.

q. Initially the children were enrolled at the Fond du Lac Ojibwe School but due to special needs, the children were enrolled at Washington School.

7. The children have extraordinary emotional and educational needs. Sierra has special educational service needs, has emotional behavorial difficulties, is suspected to have been a victim of sexual or physical abuse, and has a need for therapy for emotional problems and social adjustments. Velvet has behavioral problems and a need for a structured behavioral program, has emotional difficulties resulting from neglect and instability. Amber has behavorial problems including destructive acting out, severe emotional disturbance, is suspected of having been a victim of sexual or physical abuse and has a need for therapy.

8. All of the children have identity and grief and loss issues that must be dealt with by therapy. The children have an extraordinary need for permanence and stability resulting from multiple placements, neglect, changes in family and school environments.

9. The children are best placed together which creates an extraordinary need because of the multiple behavioral and emotional needs of the children.

10. Expert testimony of Dr. Harold Vinnes (Exhibits 30 and 31) and Marie Kistler, Licensed Psychologist, Doug Lewandowski, Licensed Psychologist, and Michelle Gordon, Licensed Psychologist, all indicates a need for permanent

placement now and for the duration of their childhood and adolescence.

11. All of the placements that have previously been made with the exception of the home of the Petitioners and the Landis' foster home were within the preferences of the Indian Child Welfare Act.

12. All of the prior placements except for those of the Petitioners and Angelique Coffey have been essentially unsuccessful and contributed to the instability which the children continue to experience.

13. The present emotional, cultural, educational and physical needs of the children are currently being met in the home of Angelique Coffey except for the need for permanence.

14. There was an intimate relationship established between the Petitioners and the children during the period that the Petitioners had the children.

15. The interaction and relationship of the children with the Petitioners provided behavorial, educational and emotional progress for the children.

16. The progress that the children made in adjusting to their home, their school and community while at the home of the Petitioners included improved performance at school and improved behavior.

17. The environment established by the Petitioners was stable and extremely satisfactory for the children.

18. The Petitioners had and have a disposition to educate and raise the children with a knowledge of their cultural background and cultural identity.

19. The Petitioners possess special skills as a therapeutic PATH foster home to provide for the mental and physical health of the children including an extraordinary capacity and disposition to give the children love, affection and guidance.

20. The best interests of the children under Minnesota Statute 518.17 not considering the preferences of the Indian Child Welfare Act are that the children be allowed to be adopted by the Petitioners.

21. The focus expressed by the PATH social worker, Lori Patch, in the PATH records indicates an extreme need for a permanently committed family.

22. The placement at the Laveau pre-adoptive home occurred after an extensive search for Native American families but was a failure due to lack of planning, lack of an appropriate transition plan and a lack of understanding of the special needs of these children.

23. At the present time and in the foreseeable future there is no Native American family which has been found after a diligent search willing to adopt the children.

24. Indian children raised in non-Indian homes are likely to have cultural identity and self-esteem and confusion resulting from a conflict in values.

25. Without a permanent home and stable environment these children will suffer from more severe identity, self-esteem and emotional difficulties, particularly if they are

subject to any further changes in home or educational environments.

26. The cultural identity of the children is an important and necessary part of the education and lives of the children.

27. The guardian ad litem, a Native American person, appointed to represent the best interests of these Native American children recommended that the adoption be granted considering the following factors:

a) The need for permanence;

b) Identity and culture can be learned through school and education;

c) The current foster home and the Campbell home are equal in terms of home environment;

d) The medical needs of the children; and

e) School and education.

28. Any other adoption other than the Petitioners or the current foster home is likely to fail even if a Native American home was available. (The Court finds that there is no adoptive home available after a diligent search.)

29. The Petitioners, although admittedly not knowledgeable in Indian culture, initiated and followed through with each culturally appropriate activity that they were aware of.

30. The cultural awareness issues can be continued with the cooperation of the children's tribe so that the children's racial and cultural identity can be insured.

Based upon the prior Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Good cause exists to overcome the preferences established pursuant to 25 U.S.C.A. Sec. 1915 (a)(1) in that the extraordinary physical and emotional needs of Sierra Graham, Amber Whipple and Velvet Graham have been established by the testimony of several qualified experts.

2. Good cause exists to overcome the preferences contained in 25 U.S.C.A. Sec. 1915 (a)(1) in that clear and convincing proof of the unavailability of any suitable families for adoption of these three children has been shown after a diligent search has been completed for families meeting the preference criteria.

3. The best interests of the children require waiving the agency placement requirements pursuant to Minn. Stat. Sec. 259.22, subd. 2(e).

4. Good cause exists and the best interests of the children require that the home study requirement pursuant to Minn. Stat. Sec. 259.27, subd. 5, be waived.

5. The requirement of permanency for these girls requires the permanent placement to be within the context of an adoptive placement.

6. The best interests of these children require immediate placement of the children with the Petitioners and that they be allowed to pursue the adoption.

7. The best interests of the children require that a detailed plan of cultural and racial education approved by the tribe or by the Court be incorporated as part of the adoption process.

Based upon the previous Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED:

1. The Petition for Adoption submitted by Eugene C. Campell and Carol E. Campell to adopt Sierra E. Graham, Amber L. Whipple, and Velvet M. Graham, shall be allowed to be filed within the meaning of Minn. Stat. Sec. 259.

2. The agency placement requirements contained in Minn. Stat. Sec. 259.22, subd. 2(e), shall be and hereby are waived.

3. The requirements that a home study be prepared pursuant to Minn. Stat. Sec. 259.27, subd. 5, shall be and hereby are waived.

4. The children shall after this school year ends or on June 1, 1993, be returned to the physical custody of the Petitioners provided that such return to physical custody shall be monitored by Beltrami County Social Services and Leech Lake Social Services so to provide for a smooth transition.

5. That 90 days following the placement of the children with the Petitioners a final adoption hearing may be scheduled before this Court for the purpose of finalizing the adoption.

6. Within 60 days the Petitioners shall provide to the Court a culturally appropriate plan of racial and cultural education for the children.

Dated this 20th day of May, 1993.

BY THE COURT:

s/s
John P. Smith
Judge of District Court

MEMORANDUM

This Court has been faced with an agonizing decision as to what is the best long-term interests of these Indian children. The testimony has been carefully reviewed and the exhibits examined and reexamined in order to produce the best result for these children.

The Indian Child Welfare Act (hereinafter I.C.W.A.) expresses a presumption that in adoptive placement of an Indian child the preferences of the Act must be followed. In Re Adoption of M.T.S., 489 N.W.2d 285 (Minn. App. 1992) at 287. The intent of the I.C.W.A. is further evidenced by the preference for jurisdictional preferences given to Indian tribes for the purpose of preserving Indian standards. 25 U.S.C.A. Sec. 1911. To overcome the preferences of the I.C.W.A., a party must establish the existence of "good cause to the contrary." In Re Adoption of M.T.S., Id.

The first determination that must be made is what standard of evidence must be applied to establish good cause. The proper standard is a standard of clear and convincing evidence. This high standard is required because it is the declared policy of the I.C.W.A. "... to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture ..." 25 U.S.C. Sec. 1902.

Sec. 1950 of the I.C.W.A. (a) sets out the preferences for adoptive placement as follows:

1) a member of the child's extended family;

2) other members of the Indian child's tribe; or

3) other Indian families.

These preferences are overcome by establishing good cause to the contrary. Sec. 1915 (b) I.C.W.A. sets out the preferences in foster care or pre-adoptive placements, in the absence of good cause to the contrary, as follows:

i) a member of the Indian child's extended family;

ii) a foster home licensed, approved or specified by the Indian child's tribe;

iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

The guidelines for state courts as adopted by the Minnesota Department of Human Services Social Services Manual XIII-3611 state as follows:

"For purposes of foster care, pre-adoptive or adoptive placement, a determination of good cause not to follow the order of preference may be based on:

a) not applicable in this case;

b) not applicable in this case;

c) the extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness;

d) a lack of suitable families for placement after a search has been completed for families meeting the preferences criteria;

e) a lack of necessary, highly specialized treatment services in the community where the families who meet the preference criteria live.

Applying the best interests of the child without reference to the I.C.W.A., the best interests as set out under Minnesota Statute Sec. 518.17, Subd. 1, would be served by placement with and adoption by the Campbells as recommended by the guardian ad litem. This finding is based upon the following:

1) the intimacy of the relationship that had been established between the Campbells and the children during the year to year-and-one-half that the Campbells had the children;

2) the interaction and relationship of the children with the Campbells as testified to by the teachers, psychologists and friends of the Campbells who related the relationship that had been established;

3) the progress that the children made in adjusting to home, school and community while they were at the Campbells, including improved performance at school and improved behavior;

4) the stability and satisfactory environment that was established by the Campbells; and

5) the skills possessed by the Campbells as a PATH foster home to provide for the mental and physical health of the children, including an extraordinary

capacity and disposition to give the children love, affection and guidance, and the disposition to educate and raise the children with a knowledge of their cultural background.

The tribe is looked at under the I.C.W.A. in the sense of a parental overseer. This Court was extremely impressed by the testimony of the qualified Indian expert witnesses who testified in this trial. They expressed many of the cultural and tribal standards which make the Indian culture unique. It was this uniqueness that the I.C.W.A. as recognized by the United States Congress seeks to preserve.

The Petitioners testified that they cannot and would not live the life of a traditional Indian family. This is disturbing and the Court does not take lightly a separation of Indian children from their culture and people. Such a separation does cause cultural and personal confusion for Indian people when they are raised in a non-Indian family.

It is because of these considerations and the presumptions expressed in the I.C.W.A. that the only possible way for the Petitioners to adopt these children is if they can meet the good cause exceptions provided in the Act. In order to meet their burden of proof, they must show by clear and convincing evidence that good cause not to apply the preferences has been established. This high standard is required because it is the declared policy of the I.C.W.A. "... to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture ..." 25 U.S.C. Sec. 1902.

The Court has found by clear and convincing evidence that the children do have extraordinary emotional needs as established by the testimony of qualified expert witnesses. The extraordinary emotional needs of the children have been

shown by repeated placements that have failed due to the difficulties that the foster homes have had due to the behavioral problems of the children. All three of the children are special needs children in the educational context both in terms of educational requirements and behavioral requirements. Every expert witness indicated that there was a need for permanency for these children now and until they are through high school.

The Court certainly wishes that there was an Indian family ready to adopt these children. The only family that had expressed a willingness to adopt the children was the Laveau family. The Laveau family, as shown in Exhibit 10, would have been an appropriate family under the I.C.W.A. because Betty Laveau was 1/16 degree Indian. The report indicates, however, that both the Laveaus have a limited knowledge of the Chippewa Indian and they would have to learn more about Chippewa culture and heritage. It also states that if the children needed Indian culture that they would make every effort to help the children seek and know their heritage.

It is difficult to rationalize the acceptance of the Laveau family as an adoptive home which fits within the letter of the preferences and reject the Campbell home which does not. The Campbell home, although not qualifying within the preferences of the I.C.W.A., does have a record of success with these children, a proven commitment to their welfare, and special skills that will insure that the children stay together and are provided a permanent and stable home.

From the evidence it has been proved by clear and convincing evidence that there is no home which is willing to adopt these children in the foreseeable future, and that the Campbell home is their best and perhaps only chance at a permanent, stable and loving family relationship.

The Court is impressed by the abundance of testimony of the appropriateness of the Angelique Coffey home for foster care. However, this foster home is not a permanent adoptive

home. The Court finds that this is in the best interests of these Indian children. All of the current physical, emotional and psychological needs are being met at the home of Angelique Coffey except that the children have no permanence.

The placements that have been provided for these children have been for the most part poorly planned, poorly prepared and poorly executed. The children have suffered at the hands of the system that is intended to protect them by numerous placements and the instability that the children have experienced. The Court has no doubt that all parties in this matter have in mind the best interests of the children, but as is often the case the children may be the losers for these efforts.

The testimony that the Campbells have the skills and perseverance and love that these children need is undisputed. The need for permanence is undisputed. The question is where that is best provided. The guardian ad litem's recommendation representing the best interests of these children is well-founded and well reasoned.

These children have obviously touched the lives of the Petitioners in a special way. The children have undoubtedly received much benefit from the love and affection that was given to them while they were with the Petitioners.

The decision in this case comes down to which special relationship the Court will follow. There is a special relationship that has been recognized by Congress in the I.C.W.A. The Indian culture carries unique values which simply cannot be absorbed in the home of the Petitioners as it could in the home of a traditional Indian family. The Congressional findings expressed in the I.C.W.A. state the unique cultural and social standards of Indian communities and families. Since it is the express intent of the Act to preserve these values, the Court wishes to carry out this intent. 25 U.S.C.A. Sec. 1901.

The Court feels in this situation that the best way to carry out the intent of the Act and still provide for the best interests

of the children is to provide for an educational and cultural plan within the Campbell home where the special needs of these children will be met.

The testimony of the expert witnesses in this case set out in detail the tribal relationship of Indian people and the cultural and social standards which make it difficult for Indian people to assimilate and share non-Indian values. It is because of this that it is difficult to follow the best interests of the child standard as set out in Minnesota Statute 518.17. The best interests of Indian children are served when there is placement with an Indian family that is a member of the children's tribe within the preferences of the I.C.W.A. provided there is not good cause for a contrary finding. Here such good cause has been established because of the extraordinary circumstances of this case.

J.P.S.

In the Matter of the CUSTODY OF S.E.G., A.L.W., and V.M.G.

No. C4-93-1054.

Court of Appeals of Minnesota.

Nov. 16, 1993.

Non-Indians filed petition to adopt three Indian children. The District Court, Beltrami County John P. Smith, J., granted petition, finding there was good cause to deviate from adoption placement preferences in the Indian Child Welfare Act. Children's tribe appealed. The Court of Appeals, Huspeni, J., held that: (1) good cause to deviate from adoption placement preferences had to be proven by clear and convincing evidence; (2) finding of good cause to deviate from adoption placement preferences was supported by children's extraordinary physical and emotional needs and unavailability of a suitable family for adoption that satisfied preference criteria; and (3) children's need for permanence could be considered in determining their extraordinary emotional needs.

Affirmed.

Schumacher, J., filed dissenting opinion.

1. Indians 6(2)

Good cause to deviate from adoption placement preferences in Indian Child Welfare Act must be proven by clear and convincing evidence, rather than by preponderance of evidence or by proof beyond reasonable doubt. Indian Child Welfare Act of 1978, § 105(a), 25 U.S.C.A. § 1915(a).

2. Evidence 596(1)

If Congress does not indicate standard of proof, resolution of issue involves discerning legislative intent.

3. Evidence 596(1)

Ordinarily, legislative silence on standard of proof is seen as intention that preponderance of evidence standard applies.

4. Indians 6(2)

Trial court's determination whether there is good cause to deviate from adoption placement preferences in Indian Child Welfare Act is reviewed for abuse of discretion, which will be found if trial court's factual findings are clearly erroneous or trial court considered improper factors in making its determination; trial court's decision is not subject to de novo review. Indian Child Welfare Act of 1978, § 105(a), 25 U.S.C.A. § 1915(a).

5. Indians 6(2)

Good cause to deviate from adoption placement preferences in Indian Child Welfare Act depends on interrelationship of many factors including, but not limited to: best interests of child, request of biological parents, reasonable preference of child of sufficient age to express preference. extraordinary physical or emotional needs of child, unavailability of suitable families meeting preference criteria after diligent search, and child's ties to tribe. Indian Child Welfare Act of 1978, § 105(a), 25 U.S.C.A. § 1915(a).

6. Indians 6(2)

Indian Child Welfare Act presumes interests of Indian child are best served by placement with extended family member. Indian Child Welfare Act of 1978, § 105(a)(1), 25 U.S.C.A. § 1915(a)(1).

7. Indians 6(1)
States 18.28

Minnesota child placement statute is preempted by Indian Child Welfare Act to extent Minnesota statute does not provide enhanced protection for rights of parent or Indian custodian. M.S.A. § 257.025(a); Indian Child Welfare Act of 1978, § 105(a)(1), 25 U.S.C.A. § 1915(a)(1).

8. Indians 6(2)

Use of term "cause" in Indian Child Welfare Act as basis for deviating from adoption placement preferences in Act was designed to provide state courts with flexibility in determining disposition of placement proceeding involving Indian child. Indian Child Welfare Act of 1978, § 105(a), 25 U.S.C.A. § 1915(a).

9. Indians 6(2)

There was good cause to deviate from adoption placement preferences in Indian Child Welfare Act, and to place Indian children with non-Indian family, based upon children's extraordinary physical and emotional needs and on unavailability of any suitable families for adoption that satisfied preference criteria. Indian Child Welfare Act of 1978, § 105(a), 25 U.S.C.A. § 1915(a).

---

10. Indians 6(2)

Determination that there were no suitable families available for adoption that met preference criteria of Indian Child Welfare Act was supported by testimony that there was general shortage of Indian homes available, that no adoptive family was found for 19 months prior to trial, and that tribal adoption worker told children's guardian ad litem that children had been taken off national adoption registry and would not be put back on for another five years, though adoption worker testified that he had active file of 48 available Indian homes,

where he did not speculate whether any of them would be an appropriate placement. Indian Child Welfare Act of 1978, § 105(a), 25 U.S.C.A. § 1915(a).

11. Indians 6(2)

Determination that children had extraordinary physical and emotional needs weighing in favor of deviating from adoption placement preferences in Indian Child Welfare Act was supported by evidence that children were diagnosed as having severe adjustment disorder with depressed mood and reactive attachment disorder of infancy or early childhood, among other disorders, and by evidence of need for permanent placement. Indian Child Welfare Act of 1978, § 105(a), 25 U.S.C.A. § 1915(a).

12. Indians 6(2)

Children's need for permanent and stable home, wherein their extraordinary needs could all be met, had to take precedence over benefits to be derived from day-to-day exposure to their cultural heritage, in determining whether there was good cause to deviate from adoption placement preferences in Indian Child Welfare Act, in view of testimony that permanent placement would be best form of treatment for children's emotional needs. Indian Child Welfare Act of 1978, § 105(a), 25 U.S.C.A. § 1915(a).

13. Indians 6(2)

That children's current placement with Indian family satisfied needs of children, and could better meet children's cultural needs than could their placement with non-Indian family, did not preclude finding that current placement did not satisfy children's need for permanent home, where foster parent testified she was unwilling to make any long-term commitment to children, but did not rule out adopting them.

Indian Child Welfare Act of 1978, § 105(a), 25 U.S.C.A. § 1915(a).

14. Indians 6(2)

Child's need for permanence may be considered in determining child's extraordinary emotional needs under Indian Child Welfare Act, though by itself need for permanence does not provide good cause to deviate from adoption placement preferences in Act. Indian Child Welfare Act of 1978, §105(a), 25 U.S.C.A. § 1915(a).

15. Indians 6(2)

In determining need for permanence under Indian Child Welfare Act, trial court should consider all relevant factors including, but not limited to, length of time child has been placed outside natural parents' home, number of placements, child's emotional needs, and child's cultural need for permanence. Indian Child Welfare Act of 1978, § 105(a), 25 U.S.C.A. § 1915(a).

16. Appeal and Error 237(6), 282

Where there has been no motion for new or amended findings, scope of appellate review is limited to whether record supports findings of fact and whether those findings support conclusions of law and judgment.

17. Indians 6(2)

Extraordinary physical or emotional needs of child must be established by qualified expert testimony, in determining whether good cause exists to deviate from adoption placement preferences in Indian Child Welfare Act. Indian Child Welfare Act of 1978, § 105(a), 25 U.S.C.A. § 1915(a).

18. Appeal and Error 971(2)

Ruling determining qualifications of expert will not be disturbed on appeal unless there is no evidence that witness had qualifications of expert or trial court has proceeded upon erroneous legal standard.

19. Evidence 537

Whether expert is qualified to testify regarding extraordinary physical or emotional needs of child, in placement proceeding under Indian Child Welfare Act, shall be determined by applying Bureau of Indian Affairs (BIA) guidelines found in Minnesota Department of Human Services manual. Indian Child Welfare Act of 1978, § 105(a), 25 U.S.C.A. § 1915(a).

20. Indians 6(2)

In determining custody of Indian children. state courts must show deference to wishes of child's tribe, but are not required, as matter of law, to adopt recommendations of tribe. Indian Child Welfare Act of 1978, § 105(a), 25 U.S.C.A. § 1915(a).

Syllabus by the Court

1. "Good cause" to deviate from the adoption placement preferences in the Indian Child Welfare Act, 25 U.S.C. § 1915(a)(1988), must be proven by clear and convincing evidence.

2. A trial court's determination whether there is "good cause" to deviate from the adoption placement preferences in the Indian Child Welfare Act, 25 U.S.C. § 1915(a), is within the court's discretion and will not be reversed absent an abuse of discretion. An abuse of discretion will be found if the trial court's factual findings are clearly erroneous or the court considered improper factors in making its determination.

3. "Good cause" to deviate from the adoption placement preferences in the Indian Child Welfare Act, 25 U.S.C. § 1915(a), depends on the interrelationship of many factors including, but not limited to: the best interests of the child; the request of the biological parents; the reasonable preference of the child, if of sufficient age to express a preference; the extraordinary physical or emotional needs of the child; the unavailability of suitable families meeting the preference criteria after a diligent search; and the child's ties to the tribe.

4. A child's need for permanence may be considered in determining the child's extraordinary emotional needs, although by itself the need for permanence does not constitute "good cause" to deviate from the adoption placement preferences in the Indian Child Welfare Act. In determining the need for permanence, a trial court should consider all relevant factors including, but not limited to: the length of time a child has been placed outside the natural parents' home, the number of placements, the child's emotional needs, and the child's cultural need for permanence.

5. The extraordinary physical or emotional needs of the child must be established by qualified expert testimony. Qualified experts shall be determined by applying the guidelines in the Minnesota Department of Human Services manual.

6. State courts, in determining the custody of Indian children, must show deference to the wishes of the child's tribe. State courts, however, are not required, as a matter of law, to adopt the recommendations of the tribe.

Anita P. Fineday, Cass Lake, for appellant Leech Lake Band of Chippewa.

Wright S. Walling, Walling & Berg, P.A., Minneapolis, for respondents E.C. and C.C.

Tim Faver, Beltrami County Atty., Shari R. Schluchter, Asst. County Atty., Bemidji, for respondent Minnesota Dept. of Human Services and Beltrami County.

Charles R. Powell, Bemidji, for guardian ad litem Diane White.

Hubert H. Humphrey, III, Atty. Gen., Laura Sue Schlatter, Asst. Atty. Gen., St. Paul, for Guardian Com'r of Minnesota Dept. of Human Services.

Shirley M. Cain, Edwards, Edwards & Bodin, Duluth, for amicus curiae Red Lake Band of Chippewa Indians.

Paul T. Minehart, Minneapolis American Indian Ctr., Minneapolis, for amicus curiae Minneapolis American Indian Center.

Native American Rights Fund, Boulder, CO, for amicus curiae Minnesota Chippewa Tribe.

Considered and decided by NORTON, P.J., and HUSPENI and SCHUMACHER, J.J.

OPINION

HUSPENI, Judge.

The trial court granted the petition of non-Indians E.C. and C.C. to adopt three Indian children. The children's tribe, the Leech Lake Band of Chippewa, challenges the court's determination that there was "good cause" to deviate from the adoption placement preferences in the Indian Child Welfare Act, 25 U.S.C. § 1915(a) (1988) (the Act). We affirm.

FACTS

Respondents E.C. and C.C. (the Cs), who are not Indians, seek to adopt three Indian children: S.E.G., born March 15, 1984; A.L.W., born July 20,1985; and V.M.G., born November 27, 1987. The three children are biological sisters and are all enrolled members of appellant, the Leech Lake Band of Chippewa Indians (the tribe).[1]

Throughout their young lives, these children have been subjected to numerous foster home placements. It is suspected that S.E.G. and A.L.W. have been victims of sexual or physical abuse, although it is not clear from the record who was the perpetrator of the abuse. The record does indicate that all three children have a history of parental abandonment.

---

[1] Several other entities are participating in this appeal. Respondent Beltrami County, the county of financial responsibility, and the Commissioner of the Minnesota Department of Human Services, the children's guardian, support the tribe's position and urge that the trial court be reversed. The children's guardian ad litem, Diane White, who is Indian, supports the Cs and argues that the trial court should be affimed. The Red Lake Band of Chippewa Indians, the Minneapolis American Indian Center and the Minnesota Chippewa Tribe have all been granted amicus curiae status and argue the trial court should be reversed.

Parental rights to the children were terminated in December 1991.

The first foster placement occurred over seven years ago in January 1986 when A.L.W. was placed in the A. foster home. In September 1986 S.E.G. and A.L.W. were placed in the home of their uncle. S.E.G. and A.L.W. were returned to their birth parents in December 1986. In April 1987, the children's parents married and moved out of state, despite a court order forbidding such a move. Upon their return to Minnesota, S.E.G. and A.L.W. lived with their maternal grandmother. V.M.G. was born in November 1987, and has never resided with her parents.

All three children were placed in the H. foster home in February 1988. V.M.G. was placed in the R. foster home in March 1988 and S.E.G. and A.L.W. were also placed in the R. foster home with V.M.G. in April 1988. Due to sexual acting out by the children, the Rs asked to have the children removed.

The children were moved to the W. foster home in February 1989 where they stayed until October 1990. The children were abruptly removed from this home after sexual abuse allegations arose. Although the foster parents were cleared of the allegations, they did not feel they could continue to care for the children because of the children's special needs.

In October 1990, the children were placed in the L. foster home. Due to a marriage dissolution, the children were abruptly returned to the home of their uncle.

S.E.G. was placed in the PATH (Professional Association of Treatment Homes) foster home of the Cs, in April 1991. Meanwhile, A.L.W. and V.M.G. were placed in the L. foster home until the Ls asked to be relieved of their duties. A.L.W. and V.M.G. were then also placed with the Cs in August 1991. At the time of the placement with the Cs, there were no Indian PATH foster homes available.

In January 1992, the children were placed in the preadoptive home of L.L. and B.L. Mrs. L. was 1/16 Chippewa and an enrolled member of the Fond du Lac Band of Chippewa. This move was with little preparation and without any prior overnight visits. The children remained in this preadoptive placement only nine days and then were returned to the Cs' home.

In October 199-9, the children were removed from the Cs' home and placed in an Indian foster home. That foster home asked to be relieved of its duties and the children were moved to the foster home of A.C., an Indian, on November 13, 1992, where the children currently reside.

All foster and adoptive placements were made within the preferences of the Indian Child Welfare Act, 25 U.S.C. § 1915(a) (1988), except for the placement with the Cs. In November 1992, the Cs filed a custody petition and sought to adopt all three children. The children's Indian tribe opposed the adoption and the matter proceeded to trial in March and April 1993.

Numerous experts and other witnesses testified on many issues including the needs of the children, the problems generally shared by Indian children who have been raised in non-Indian homes, and the availability of Indian homes. In an order issued May 20, 1993, the trial court determined that "good cause" existed to deviate from the adoption placement preferences in the Indian Child Welfare Act and granted the Cs' request to adopt all three children.

ISSUES

Did the trial court err in determining that "good cause" exists to deviate from the adoption placement preferences in the Indian Child Welfare Act, 25 U.S.C. § 1915(a) (1988)?

1. What standard of proof should a trial court apply in determining whether there is "good cause" to deviate from the adoption placement preferences in the Act?

2. What standard of review should an appellate court apply in reviewing a trial court's determination that there is "good cause" to deviate from the adoption placement preferences in the Act?

3. What factors should a trial court apply in determining whether there is "good cause" to deviate from the adoption placement preferences in the Act? Was "good cause" established in this case?

4. May a child's need for permanence be considered in determining the child's extraordinary emotional needs? What factors should a trial court consider in determining a child's permanency need?

5. Is the evidence supported by qualified expert testimony? Did the tribe properly raise this issue on appeal?

6. Must a state court, in determining the custody of Indian children, show complete deference to the recommendations of the child's tribe?

ANALYSIS

In passing the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1988), Congress stated:

> [A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are *placed in non-Indian foster and adoptive homes* and institutions.

25 U.S.C. § 1901(4) (emphasis added).

> Thus Congress declared its policy to be to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

Id., § 1902.

More recently, a task force commissioned by the Minnesota Supreme Court found that minority children were "vastly over-represented" within the foster care system. *Minnesota Supreme Court Task Force on Racial Bias in the Judicial System*, 82 (1993). In Hennepin County, Indian children represented 17 percent of out-of-home placements, even though the total minority population of Hennepin County is only 11 percent. *Id.* at 82-83. For Indian children in particular, their out-of-home placements exceeded white children by over 10 times. *Id.* at 83. Given the removal data, the task force found sufficient evidence to believe some bias must exist. *Id.*

The central issue in this case is whether there was "good cause" to deviate from the adoption placement preferences in the Act, which provides:

> In any adoptive placement of an Indian child under State law, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

25 U.S.C. § 1915(a) (emphasis added).

I. *Standard of Proof*

[1] In reviewing the trial court's conclusion that "good cause" exists to deviate from the adoption placement preferences in the Act, we must, as a threshold matter, determine the proper standard of proof which the trial court is required to apply in making that determination. Here, the trial court applied a "clear and convincing evidence" standard, and observed that this high standard was necessary to promote the stability and security of Indian tribes. Amici, the Minnesota Chippewa Tribe and the Minneapolis American Indian Center, argue the trial court applied the wrong standard of proof, and urge this court to adopt a "beyond a reasonable doubt" standard—the standard that is used to terminate parental rights under the Act. *See id.* § 1912(f). Amici, however, cite no case law to support their position.

[2, 3] The Act itself is silent in regard to the standard of proof courts should apply in making a "good cause" determination, and research reveals no cases directly addressing the proper standard. If Congress does not indicate the standard of proof, resolution of the issue involves discerning legislative intent. *Steadman v. Securities & Exchange Comm'n*, 450 U.S. 91, 96 n. 10, 101 S.Ct. 999, 1005 n. 10, 67 L.Ed.2d 69 (1981). Ordinarily, legislative silence on standard of proof is seen as an intention that the preponderance of the evidence standard applies. *Cf. Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991) (noting that federal Congress' silence on standard of proof issue is inconsistent with the view that it intended a higher standard of proof).

We believe it is unreasonable to assume that Congress, by its silence, intended to apply the preponderance of the evidence standard when determining whether "good cause" exists to deviate from the adoption placement preferences in the Act. In passing the Act, Congress noted that there is "no

resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). The United States Supreme Court has stated that the "good cause to the contrary" language in section 1915(a) is the "most important substantive requirement imposed on state courts." *Mississippi Band of Choctaw Indiana v. Holyfield*, 490 U.S. 30, 36-37, 109 S.Ct. 1597, 1602, 104 L.Ed.2d 29 (1989).

Conversely, we do not believe that Congress intended to require that "good cause" to deviate from the adoptive placement preferences in the Act must be found beyond a reasonable doubt. *Cf.* 25 U.S.C. § 1912(e) (foster care placements under the Act must be supported by "clear and convincing evidence"). If Congress had intended application of such a heightened standard, it could have explicitly provided for such a standard just as it did with the termination of parental rights. *See* 25 U.S.C. § 1912(f). Moreover, to impose a beyond a reasonable doubt standard would take away the "flexibility" of state courts in applying the "good cause" standard. *See In re Interest of Bird Head*, 213 Neb. 741, 331 N.W.2d 785, 791 (1983) (term "good cause" was designed to provide courts with flexibility in determining the position of Indian children).

Accordingly, we hold that the trial court did not err in determining that there must be clear and convincing evidence of "good cause" to deviate from the adoption placement preferences in the Act.

II. *Standard of Review*

[4] The parties dispute what standard of review this court should apply in reviewing the trial court's determination that there was "good cause" to deviate from the adoption placement preferences in the Act. The Cs contend the standard of review is whether the trial court abused its

discretion by making findings unsupported by the evidence or by improperly applying the law. *See Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn.1985). The tribe contends that this case involves the interpretation of a statute, a question of law, and, thus, the trial court's decision is subject to de novo review. *See Doe v. Minnesota State Bd. of Medical Examiners*, 435 N.W.2d 45, 48 (Minn.1989).

We conclude that the proper standard of review in this case is to ask whether the trial court abused its discretion. The tribe's contention that this case involves the construction of a statute and is therefore subject to de novo review would apply with equal validity to all custody proceedings governed by state law, since those proceedings involve the application of factors set forth in Minn.Stat. § 518.17 (1992). It is clear, however, that custody proceedings under state law are reviewed under an abuse of discretion standard. *See Pikula*, 374 N.W.2d at 710. The fact that this case involves the Act does not alter the applicable standard of review.

The Alaska Supreme Court, in addressing whether "good cause" existed to deviate from the adoption placement preferences of the Act and place an Indian child with a non-Indian family, enunciated a standard of review identical to that which we adopt:

> *A good cause determination is within the superior court's discretion.* We will reverse an adoptive placement preference determination only if convinced that the record as a whole reveals an *abuse of discretion* or if controlling factual findings are clearly erroneous. Abuse of discretion is established if the superior court considered improper factors or improperly weighted certain factors in making its determination.

In re Adoption of F.H., 851 P.2d 1361, 1363 (Alaska 1993) (citations omitted) (emphasis added); *see also In re Appeal in*

Maricopa County Juvenile Action No. A-25525, 136 Ariz. 528, 534, 667 P.2d 228, 234 (App.1983) (the trial court did not abuse its discretion in declining to follow the preferences for adoptive placement); *In re Adoption of M.,* 66 Wash.App. 475, 832 P.2d 518, 522 (1992) ("[g]ood cause is a matter of discretion").

What constitutes "good cause" is unique to the individual facts of each case. Therefore, "good cause" is a factual finding subject to the clearly erroneous standard. *See* Minn. R.Civ.P. 52.01; *In re Welfare of T.K.,* 475 N.W.2d 88, 91 (Minn.App.1991). "Clearly erroneous" has been defined as "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Northern States Power Co. v. Lyon Food Prods., Inc.,* 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

A trial court's determination whether there is "good cause" to deviate from the adoption placement preferences in the Act is a determination that rests within the court's discretion. This court will find an abuse of that discretion only if the trial court's factual findings are clearly erroneous or the trial court considered improper factors in making its determination.

III. *Good Cause*

[5] The Act does not define the term "good cause" as used in section 1915(a). Thus, we must look to other sources for guidance. The Department of the Interior through the Bureau of Indian Affairs has issued guidelines (BIA Guidelines) to assist state courts in applying the Act and the "good cause" exception in Indian child custody proceedings. For purposes of adoptive placement, a determination of "good cause" not to follow the order of preference in the Act shall be based on one or more of the following considerations:

(i) The request of the biological parents or the child when the child is of sufficient age.

(ii) The *extraordinary physical or emotional needs of the child* as established by testimony of a qualified expert witness.

(iii) The *unavailability of suitable families* for placement after a diligent search has been completed for families meeting the preference criteria.

BIA Guidelines, F.3, 44 Fed.Reg. 67,583, 67,594 (1979) (emphasis added).[2]

We find additional guidance in case law from other states. The Alaska Supreme Court stated that whether in a particular case there is "good cause" to deviate from the placement preferences depends on many factors

> including, but not necessarily limited to, the best interests of the child, the wishes of the biological parents, the suitability of persons preferred for placement and the child's ties to the tribe.

Adoption of F.H., 851 P.2d at 1363-64.

The Washington Court of Appeals stated that discretion must be exercised in light of many factors including

---

[2] These guidelines are not regulations and are not intended to have binding legislative effect. Rather, following the guidelines will help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters. Administrative interpretations of statutory terms are given important but not controlling significance. BIA Guidelines, Introduction, 44 Fed.Reg. 67,583. 67,584 (1979); *see also In re Adoption of T.R.M.*, 525 N.E.2d 298, 307 (Ind. 1988) ("guidelines are helpful but neither controlling nor binding upon state proceedings"), *cert. denied*, 490 U.S. 1069, 109 S.Ct. 2072, 104 L.Ed.2d 636 (1989).

> the best interests of the child, the wishes of the biological parents, the suitability of persons preferred for placement. the child's ties to the tribe and the child's ability to make any cultural adjustments necessitated by a particular placement.

Adoption of M., 832 P.2d at 522 (citations omitted); *see also In re Interest of J.R.H.*, 358 N.W.2d 311, 321-22 (Iowa 1984) (court should consider the rich Indian heritage the child will be deprived of if placed in a white foster home).

We believe that when warranted under the facts of a particular case, all the factors set forth in the BIA guidelines and the case law may be considered by a trial court in determining whether there is "good cause" to deviate from the adoption placement preferences in the Act.[3]

[6, 7] In addressing the best interests of the children, we note that the Act applies a standard different from that typically applied by state courts in custody disputes. *See* Minn.Stat. § 257.025(a) (1992) (listing relevant factors in determining the best interests of the child). The Act presumes the interests of an Indian child are best served by placement with an extended family member. 25 U.S.C. § 1915(a)(1). Because Minn.Stat. § 257.025(a) does not provide enhanced protection for the rights of the parent or Indian custodian, section 257.025(a) is preempted by the Act. *In re Adoption of M.T.S.*, 483 N.W.2d 285, 288 (Minn.App.1992); see 25 U.S.C. § 1921 (if state or federal law provides a higher standard of protection to the rights of the parent or Indian

---

[3] In this case the biological parents did not express a preference and thus this factor was not relevant to the trial court's decision. Further, although the guardian ad litem testified that all the children, especially the oldest, expressed a preference to live with the Cs, the trial court made no findings with regard to this factor. Therefore, we do not address the preferences of the children as a factor in our decision.

custodian of an Indian child, the court shall apply the state or federal standard). Nevertheless, even though the Act may alter the focus of the best interests analysis, the Act does not change the cardinal rule that the best interests of the child are paramount. *Bird Head,* 331 N.W.2d at 791; *see also In re N.L.*, 754 P.2d 863, 870 (Okla.1988) (court should consider whether "good cause" exception in section 1915 is met by the child's best interests).

[8] The legislative history of the Act indicates that the use of the term "good cause" was designed to provide state courts with "flexibility" in determining the disposition of a placement proceeding involving an Indian child. BIA Guidelines, Introduction, 44 Fed. Reg. at 67,584 (citing S.Rep. No. 95-597, 95th Cong., 1st Sess. 17 (1977)). Although 25 U.S.C. § 1915(a) establishes a federal policy that, where possible, Indian children should remain in the Indian community, it should "not be read as precluding the placement of an Indian child with a non-Indian family." H.R.Rep. No. 95-1386, 95th Cong.. 2d Sess. 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546.

[9] The trial court concluded (applying factors (ii) and (iii) in the BIA Guidelines) that there was "good cause" to deviate from the adoption placement preferences in the Act because the children have "extraordinary physical and emotional needs" and because of the "unavailability of any suitable families for adoption" that meet the preference criteria. Furthermore, the court concluded the "best interests" of the children require "immediate placement" with the Cs.

[10] 1. With respect to the unavailability of suitable families that meet the preference criteria, the trial court found:

> At the present time and in the foreseeable future there is *no Native American family* which has been found after a diligent search *willing to adopt the children.*

(Emphasis added.)

The tribe argues that there *are* Indian families available to adopt the children. Frederick E. Isham, Jr.. a foster care adoption worker with the Minnesota Chippewa Tribe Human Services Division, testified that he had been actively recruiting an adoptive home for the children since August 1990, and that he had an active file of 48 available Indian homes. Isham would not speculate on whether one of these 48 homes would be an appropriate placement, but did state that there was a family in Missouri willing to take the children. Isham admitted, however, that this Missouri home had never been given specific information regarding the children's problems. Isham further testified that the children are not ready for adoption because they have various problems that must first be addressed. Valerie Seelenbinder-Capece, a PATH social worker, testified it could take at least two to four years for the children to stabilize and work out some of their problems.

Other testimony indicated that there were no suitable family members available for adoption and that there is a shortage of Indian homes available. Furthermore, the children's guardian ad litem testified that Isham told her the children had been taken off the national adoption registry and would not be put back on for another five years.

We believe that the trial testimony supports the trial court's finding that there is no Indian family now or in the near future willing to adopt the children. The January 1992 preadoption placement of the children in the L. home lasted only nine days. No placements have since been attempted. A proper inference is that if there was an Indian home presently capable of permanently meeting the extraordinary needs of these children and willing to do so, placement in that home would have been attempted.

The tribe argues that the 11-month period from termination of parental rights in December 1991 until the children moved in with A.C. in November 1992, is not

sufficient time to conduct a diligent search for an adoptive home. In fact however, the tribe spent 15 months searching for an adoptive family prior to the children's placement with A.C. and had 19 months prior to trial to look for an adoptive family.

We decline to specify what might be a reasonable length of time to find an adoptive home. We recognize the difficulties that may arise in seeking to place three children, all of whom have special needs, in the same home. Unfortunately, such placement could not be arranged with an Indian family. While we are not insensitive to the tribe's conscientious efforts to find a suitable home for the children, we must recognize that at some point in time the best interests and extraordinary needs of the children may require that alternatives be considered. The trial court after hearing all of the testimony, was in the best position to determine whether the tribe had sufficient time to find a suitable Indian family. The trial court's finding that at present or within the foreseeable future there is no Native American family willing to adopt the children is not clearly erroneous.

[11] 2. With regard to the children's extraordinary needs, the trial court found:

> The children have *extraordinary emotional and educational needs.* [S.E.G.] has special educational service needs, has emotional behavioral difficulties, is suspected to have been a victim of sexual or physical abuse, and has a need for therapy for emotional problems and social adjustments. [V.M.G.] has behavioral problems and a need for a structured behavioral program, has emotional difficulties resulting from neglect and instability. [A.L.W.] has behavioral problems including destructive acting out, severe emotional disturbance, is suspected of having been a victim of sexual or physical abuse and has a need for therapy.

> The children have an *extraordinary need for permanence* and stability resulting from multiple placements, neglect, changes in family and school environments.

(Emphasis added.)

The evidence adduced at trial supports the trial court's findings. S.E.G. has been diagnosed as having severe adjustment disorder with depressed mood and reactive attachment disorder of infancy or early childhood; A.L.W. has been diagnosed as having an extreme case of posttraumatic stress disorder; and V.M.G. has been diagnosed as having extraordinary needs due to parental abandonment and multiple foster home placements. In sum, the evidence is virtually uncontradicted that all three children have extraordinary emotional needs. We cannot, however, end our inquiry at this point.

The BIA Guidelines provide:

> In a few cases a child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live.

BIA Guidelines, F.3 Commentary, 44 Fed. Reg. at 67,594. Based on this commentary, the tribe contends the trial court erroneously applied the law because any specialized services needed to meet the children's extraordinary needs can be obtained in the community where A.C. resides. In fact the trial court specifically found that:

> The present emotional, cultural, educational and physical needs of the children are currently being met in the home of [A.C.] *except for the need for permanence.*

(Emphasis added.)

Accepting the tribe's general proposition that specialized services may be available in A.C.'s home, we must focus on the court's concern with permanency, and ask whether and to what extent a child's need for permanency may be considered in determining whether there is "good cause" to deviate from the adoption placement preferences in the Act.

IV. *Permanency*

The trial court found:

> Expert testimony * * * indicates a *need for permanent placement* now and for the duration of their childhood and adolescence.

(Emphasis added.) The evidence adduced at trial clearly supports this finding. Numerous witnesses testified to the necessity of placing the children in a permanent home. For example, experts testified that the best form of treatment for S.E.G.'s emotional needs would be placement in a permanent adoptive home; that A.L.W. has an extraordinary need for an immediate "placement that will not change and will be permanent for her until she graduates from high school;" and that V.M.G. needs a "secure, calm, consistent environment for the long-term." Additionally, the guardian ad litem testified the children need a permanent, stable home.

[12] The tribe and Beltrami County argue that the trial court erroneously elevated the need for permanency to a new "good cause" basis, thereby ignoring the adoption placement preferences in the Act. As a policy matter, the tribe and Beltrami County argue that if we judicially determine that children who are in need of permanence are an exception to the adoption placement preferences in the Act, nearly every Indian child currently in an out-of-home foster placement will be at risk for adoption in a non-Indian home. The availability of these many children for non-Indian adoption would, the

tribe and Beltrami County, devastate the tribe and run directly counter to the strong policy statements of the Act.

We recognize the extreme importance to both Indian children and the tribe that the relationship between them be zealously guarded, fostered and nourished by those individuals and agencies charged with making placement decisions. We conclude, however, that the decision made by the trial court in the case of the three children here will not trigger the destructive consequences foreseen by Beltrami County and the tribe—consequences which all concerned in this matter wish to avoid.

Although the trial court certainly considered finding a permanent home for the children to be very important, the court did not create a new standard for determining "good cause" to deviate from the adoption placement preferences in the Act. Rather, the court merely considered permanence to be a necessary factor in meeting the extraordinary emotional needs of these particular children in this particular case. The many failed placements and resultant extraordinary emotional needs experienced by the children here serve to distinguish this case, we believe, from the cases of other Indian children presently in foster care.

The inextricable relationship between the need for permanency and the extraordinary needs of these children is evidenced in the testimony of Frederick Isham, who stated that there *were* Indian adoptive homes available, but that he would not consider the children available and ready for placement until their various problems were addressed and ameliorated. Such rationale must be deemed flawed, at least to the extent that expert testimony demonstrated that the very root causes of the extraordinary needs of these children can be traced in large measure to the lack of permanency evidenced by the disruptive and multiple placements they have experienced throughout the majority of their young lives. While we share the concerns raised by the dissent that white, middle-class

standards of permanency may be misapplied in cases involving the Act, we believe that all children, whatever their cultural or ethnic heritage, may develop extraordinary needs. The role of permanence in meeting the extraordinary needs of the three children in this case cannot be minimized.

In F.H., 851 P.2d at 1365, the Alaska Supreme Court specifically held that the trial court properly considered the child's need for permanent placement. This was true, even though the Division of Family and Youth Services expressed an intent to immediately place the child with the mother's Indian cousin if the adoption did not go through. The court stated:

> The superior court properly considered F.H.'s situation if the adoption petition were dismissed. It was not clearly erroneous for the superior court to find that F.H.'s uncertain situation would have continued if the Hartleys were not allowed to adopt F.H.

Id.: accord In re T.S., 245 Mont. 242, 801 P.2d 77, 80-81 (1990) (removal of Indian child from her stable and protected non-Indian environment would "devastate" the child and would have "long-term harmful effects" upon her).

The trial court did not err in this case when it considered the need for permanency as it related to the extraordinary needs of the children.

We do not intend in any way to diminish the importance of an Indian child's need to create and maintain ties to the Indian culture while also maintaining permanence of residency. We give particular credence to the arguments of amicus curiae Red Lake Band of Chippewa Indians that Indian children are best raised in Indian homes, that Indian children who are raised in white homes may suffer significant psychological problems, and that the loss of Indian children will adversely affect the viability of tribal communities and culture.

It is important that the Indian child's need for permanence be strengthened through ties to tribe and culture. Adoption of an Indian child by a white family, however, does not necessarily signal the loss of all cultural ties. In the present case, the Cs testified that, if allowed to adopt, they would follow through with culturally appropriate activities for the three children. We find this willingness on the part of the Cs a very important step in maintaining the children's cultural ties to the Indian community. The trial court indicated its recognition of the importance of these ties by ordering the Cs to submit an appropriate racial and cultural education plan.

We do not suggest that participation in occasional cultural activities is a total substitute for living day-to-day in an Indian environment. True appreciation and understanding of Indian culture undoubtedly can best be achieved by daily experience and exposure. We are compelled to recognize, however, that under the unique facts of this case, the children's need for a permanent and stable home, wherein their extraordinary needs can all be met, must take precedence over the benefits to be derived from day-today exposure to their cultural heritage.

[13] The tribe also argues that testimony at trial[4] demonstrated that A.C. is currently meeting the children's need for permanency. We recognize that expert witness testimony indicates that A.C. is doing an excellent job in meeting the needs of the children, and can better meet the children's cultural needs than can the Cs. But the evidence equally supports the court's finding that A.C. has not satisfied the children's need for a permanent home. A.C. herself testified

---

[4] The weight and credibility afforded conflicting testimony is not to be determined by the number of witnesses one produces. *Swanson v. Minneapolis St. Ry. Co.*, 252 Minn. 484, 486, 90 N.W.2d 514, 516 (1958). The trial court, sitting without a jury, is the sole judge of credibility of witnesses and may accept all or only part of any witness' testimony. *Roy Matson Truck Lines, Inc. v. Michelin Tire Corp.*, 277 N.W.2d 361, 362 (Minn. 1979).

that she was unwilling to make any long-term commitment to the children, although she did not rule out adopting them. The guardian ad litem testified that A.C. never gave her any indication that she would be willing to take the children permanently. Conversely, the Cs have a successful track record with the children and are at present both willing to assume and capable of meeting the children's needs for a permanent and stable home.

[14, 15] In conclusion, a child's need for permanence may be considered in determining the child's extraordinary emotional needs, although by itself the need for permanence does not constitute "good cause" to deviate from the adoption placement preferences in the Act. In determining the need for permanence, a trial court must carefully consider the unique facts of each case, including, but not limited to, the length of time a child has been placed outside the natural parents' home, the number of placements, the child's emotional needs and the child's cultural need for permanence. Applying these standards, we hold that the trial court did not err in considering the permanency needs of the children in determining that their extraordinary emotional needs justified deviation from the preferred placements under the Act.

V. *Qualified Expert Testimony*

The tribe argues that the testimony upon which the trial court relied came from persons who were not properly qualified as experts. and thus the findings are not supported by the evidence.

[16] This argument has been improperly raised on appeal because no new trial motion was made in this case. Where there has been no motion for a new trial or amended findings, it is well-established that the scope of appellate review is limited to whether the record supports the findings of fact and whether those findings support the conclusions of law and the

judgment. *Beasley v. Medin*, 479 N.W.2d 95, 98 (Minn.App.1992); *Kuchenmeister v. Kuchenmeister*, 414 N.W.2d 538, 541 (Minn.App.1987). Nonetheless, because of the important interests at stake, we will not summarily dismiss this issue. See Minn.R.Civ.App.P. 103.04 (this court may review any other matter as the "interest of justice may require").

The Act itself does not address whether a "good cause" determination must be shown by "qualified expert testimony." *Cf.* 25 U.S.C. § 1912(f) (termination of parental rights under the Act must be supported by the testimony of "qualified expert witnesses"). The BIA Guidelines, however, do provide that the extraordinary physical or emotional needs of the child shall be established by the testimony of a "qualified expert witness." BIA Guidelines, F.3.(a)(ii), 44 Fed. Reg. at 67,594.

[17] We agree with the BIA Guidelines and hold that the extraordinary physical or emotional needs of the child must be established by qualified expert testimony. Qualified expert testimony is necessary to provide the court with knowledge of the social and cultural aspects of Indian life and to diminish the risk of cultural bias. N.L., 754 P.2d at 867.

[18] The trial court, in its discretion, rules on the qualifications and competency of a witness to give opinion evidence. A ruling determining qualifications of an expert will not be disturbed unless there is no evidence that the witness had the qualifications of an expert or the trial court has proceeded upon an erroneous legal standard. In *re Welfare of T.J.J.*, 366 N.W.2d 651, 655 (Minn.App. 1985) (citing *In re K.A.B.E.*, 325 N.W.2d 840, 844 (S.D.1982)).

[19] To determine whether witnesses qualify as experts under the Act. Minnesota follows the guidelines issued by the BIA and found in the Department of Human Services (DHS) manual. In *re Welfare of M.S.S.*, *465* N.W.2d 412, 417

(Minn.App.1991).[5] In the present case, the trial court's memorandum references the DHS manual and there is no indication the court erroneously applied the factors.

It is true that several of the Cs' main witnesses were not expressly qualifiied as Indian experts despite their testimony concerning their experience and knowledge of Indian social and cultural standards. Likewise. some of the tribe's witnesses were not qualified as Indian experts even though they appear to meet the DHS criteria. Other witnesses called by the Cs and the tribe, however, were expressly qualified as Indian experts.

In its conclusions, the trial court stated that the extraordinary emotional needs of the children were established by the testimony of several "qualified experts." In its memorandum, the court reiterated that it relied on the testimony of "qualified expert witnesses." The trial court did not abuse its discretion in making these determinations. Accordingly, we conclude there was qualified expert testimony supporting the trial court's findings.

---

[5] Under the DHS guidelines, a qualified expert witness should be:

(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(iii) A professional person having substantial education and experience in the area of his or her specialty and having substantial knowledge of prevailing social and cultural standards and childrearing practices within the Indian community.

In *re Welfare of M.S.S.*, 465 N.W.2d 412, 417 (Minn.App.1991) (quoting DHS manual, XIII-3586 (January 30, 1987)).

VI. *Deference to Tribe*

[20] Amici, the Minnesota Chippewa Tribe and the Minneapolis American Indian Center, urge this court to hold that where the tribe has formally intervened in a state court proceeding, the state court must adopt the recommendations of the tribe regarding placement of Indian children. Amici offer no case law or statutory support for this position. and we decline to make a rule that sweeps so broadly. The tribe's wishes are certainly an important factor to consider in determining the custody of Indian children. *See, eg., In re Custody of A.K.H.,* 502 N.W.2d 790, 795 (Minn.App.1993) (tribal sovereignty should be respected in family relationships), *pet for rev. denied* (Minn. Aug. 24, 1993). To adopt amici's position, however, would render a trial or the exercise of any trial court discretion meaningless, because the trial court always would be required to follow the tribe's recommendations regardless of the evidence adduced.

Further, an assertion that the trial court should be required to adopt the tribe's recommendation is not in accord with the Act's legislative intent. Although Congress recognized that great deference should be paid to the tribe's wishes, there is no suggestion of complete deference. The legislative history of the Act provides:

> While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children * * * it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.

H.R.Rep. No. 95-1386, 95th Cong., 2d Sess. 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7541. Additionally,

the flexibility of the "good cause" standard necessarily implies some discretion on the part of the trial court. *See Bird Head*, 331 N.W.2d at 791. Accordingly, the Act does not contemplate that a state court must give complete deference to tribal recommendations with regard to the placement of Indian children. *Cf. In re Adoption of T.R.M.*, 525 N.E.2d 298, 306 (Ind.1988) (Act does not require "absolute deference" to tribal court judgments), *cert. denied*, 490 U.S. 1069, 109 S.Ct. 2072, 104 L.Ed.2d 636 (1989). Finally, because the best interests of minor children continue to be so critically important in both Indian Child Welfare Act and non-Indian Child Welfare Act cases. a certain trial court discretion must, of necessity, continue.

DECISION

The trial court did not abuse its discretion in determining that the Cs established "good cause" to deviate from the adoption placement preferences in the Indian Child Welfare Act. Accordingly, we affirm the court's determination that the Cs shall be allowed to proceed with the adoption of S.E.G., A.L.W. and V.M.G.

Affirmed.

SCHUMACHER, Judge (dissenting).

I respectfully dissent from the majority's decision. I would reverse the trial court's determination that there is "good cause" to deviate from the adoption placement preferences in the Indian Child Welfare Act. 25 U.S.C. § 1915(a) (1988).

The separation of Indian children from their families is perhaps the most tragic and destructive aspect of Indian life

today. H.R.Rep. No. 95-1386, 95th Cong., 2d Sess. 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531.

> In addition to the trauma of separation from their families, most Indian children in placement * * * have to cope with the problems of adjusting to a social and cultural environment much different than their own.

Id. In response to these concerns, Congress passed the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1978).

> The most important substantive requirement imposed on state courts is that of section 1915(a), which, absent "good cause" to the contrary, mandates that adoptive placements be made preferentially with (1) members of the child's extended family; (2) other members of the same tribe; or (3) other Indian families.

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36-37, 109 S.Ct. 1597, 1602, 104 L.Ed.2d 29 (1989).

The Act is based on the fundamental assumption that it is in Indian children's best interests that their relationship to the tribe be protected. *Id.* at 50 n. 24, 109 S.Ct. at 1609 n. 24. Because the removal of Indian children from their cultural setting seriously impacts long-term tribal survival and has a damaging social and psychological impact upon individual children, it is imperative that the trial court's findings be carefully scrutinized.

The evidence does not support the trial court's finding that after a diligent search, there is an unavailability of suitable Indian families meeting the preference criteria. Foremost, only 11 months lapsed between the time parental rights were terminated in December 1991 until the children moved into their present home with A.C. Given the difficulties of placing

three children with special needs together, I believe the trial court placed an unfair and unreasonable burden upon the tribe.

A diligent attempt to find a suitable family includes, at a minimum, contact with the child's social service program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources. BIA Guidelines, F.3 Commentary, 44 Fed.Reg. 67,595 (1979).

Foster care adoption worker Fred Isham testified that he had an active file of Indian homes available. Although Isham would not speculate on the suitability of one of these homes, the evidence does not show that none of these homes would be an appropriate placement for the children. It is illogical to assume that the tribe could investigate these known homes as well as conduct a search on a national level all within less than a year's time. Moreover, I cannot agree with the court's finding that no Indian families will be available in the "foreseeable future." There is simply no basis to predict what may or may not occur in the near future.

Although the evidence does support the trial court's finding that the children have "extraordinary" emotional needs, the evidence also supports the court's finding that the children's present emotional, cultural, educational and physical needs are being met in A.C.'s home. Since the children's needs are currently being met, the tribe should not be pressured into finding an adoptive home. The failed placement in the L. home only goes to show that placement in an adoptive home must be carefully planned. Developing an adequate transition plan will necessarily take time. The court's decision in this case will only serve to force Indian tribes to move children into Indian homes without adequate planning and will likely result in more failed placements.

Where the children are in a stable Indian home and their needs are being met, such as in the present case, the children's tribe must be given sufficient time to find an adoptive home.

As the majority states, it is difficult to specify what might be a reasonable length of time to find an adoptive home. That decision will necessarily turn on the facts of each case. Under the facts of this case, it is apparent to me that the tribe was not given sufficient time to find an adoptive home.

Moreover, it is not the role of trial courts or this court to second-guess the social service policies of Indian tribes. Apparently, the tribe has decided that the children are not ready for adoption due to their special needs. This decision should be respected. Contributing to the problem of the placement of Indian children in non-Indian homes is the failure of state officials and agencies to take into account the special problems and circumstances of Indian families and the legitimate interest of Indian tribes in preserving and protecting the Indian family. H.R.Rep. No. 95-1386, 95th Cong., 2d Sess. 19 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7546.

The Commissioner of Indian Affairs has stated that one purpose of the Act is to address problems caused by the failure of state courts to recognize the cultural and social standards prevailing in Indian communities. *In re L.A.C.*, 8 Indian L.Rep. (Am.Indian Law.Training Program) 5021, 5022 (1981). In no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships. *Holyfield*, 490 U.S. at 34, 109 S.Ct. at 1601 (citing Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs, 95th Cong., 2d Sess. (1978) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association)). Nontribal governments often have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. *Id.* at 34-35, 109 S.Ct. at 1601.

Numerous witnesses testified as to the unique culture in Indian communities as well as the difficulty Indian children

face when raised in white homes. For example, licensed social worker Penny King, a qualified Indian expert witness, testified that it is vital to the identity of Indian people that they know where they come from and that they have contact with their tribe and Indian people. Licensed social worker Lorraine Patch, an Indian who was raised in a white foster home since age nine, testified the Cs could not provide for the children's cultural needs except in a very superficial way. Psychotherapist Michelle Gordon, who is Indian and has had extensive experience working with Indian children, testified that the children in this case feel shame because they are Indian and culture is important in raising Indian children.

This court's decision will take away the tribe's right to maintain the children in a culturally appropriate environment. Thus, Indian tribes will be forced to choose adoption over foster care. Yet nowhere in the Act is adoption favored over foster care. The trial court decided, and this court has affirmed, that the Cs should be allowed to adopt the children based primarily on the children's need for permanency.

I would hold that the trial court erroneously construed the Act to favor a permanent home placement over cultural heritage. It is clear from the legislative history of the Act that retaining a child's cultural heritage is of primary importance. The Act itself does not mention a need for permanence. This court has effectively created a new standard for finding "good cause" to deviate from the adoption placement preferences in the Act.

Elevating permanence to the level of "good cause" may seriously affect the viability of Indian tribes. I cannot so easily dismiss the concerns of the tribe and of Beltrami County that all children in foster placements will be at risk for adoption in a non-Indian home. Given the limited number of Indian homes available to adopt children, the importance placed on the majority's concept of permanency may seriously undermine the purposes of the Act. It is likely that more Indian children will

be removed from the Indian community and placed in non-Indian homes, exactly the result the Act was intended to prevent.

Even if permanence is a factor in determining the children's emotional needs as the majority suggests, the concept of permanency has been misapplied in this case. Certainly all children have a need for permanence, The need for permanence, however, must be viewed from the perspective of the Indian family. The standard to be applied in meeting the preference requirements of section 1915(a) are the "prevailing social and cultural standards of the Indian community." 25 U.S.C. § 1915(d). Ignorance of Indian cultural values and social norms may result in decisions wholly inappropriate in the context of Indian family life. All too often a white, middle-class standard is applied, which, in many cases, forecloses placement with an Indian family. H.R.Rep. No. 95-1386, 95th Cong., 2d Sess. 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546. *See also* 25 U.S.C. § 1901(5) ("States * * * have often failed to recognize * * * the cultural and social standards prevailing in Indian communities and families.").

I believe the trial court erred by concluding that the children's need for permanence could be met through placement with the Cs. Applying an Indian standard, it is clear that the Cs cannot meet the children's permanency need because they cannot, on a daily basis, provide for the children's cultural needs. The children's cultural heritage can only be maintained by living in an Indian environment and practicing Indian rituals on a daily basis.

Lastly, I note that the proceeding in this case should never have taken place. Although the wishes of the Cs to adopt three special needs children are admirable, the Cs should not have had an expectation that they would be allowed to adopt the children. E.C. testified it was made clear that when the children were placed it was a temporary placement and a

search for an Indian family was being conducted. C.C. further testified that Fred Isham had told her they could not adopt the children.

In conclusion, the trial court abused its discretion in finding "good cause" to deviate from the adoption placement preferences in the Act. The court's finding that there is an unavailability of suitable families after a diligent search meeting the preference criteria is not supported by the evidence. Additionally, the trial court improperly applied the concept of permanency in determining the children's extraordinary emotional needs. Therefore, I would reverse the decision of the trial court.

MATTER OF CUSTODY OF S.E.G.
Cite as 521 N.W.2d 357 (Minn. 1994)

In the Matter of the CUSTODY OF S.E.G., A.L.W. and V.M.G.

No. C4-93-1054.

Supreme Court of Minnesota.

Aug. 31, 1994.

Non-Native American foster parents petitioned to adopt Native American children. The District Court, Beltrami County, John P. Smith, J., granted petition, finding good cause to deviate from adoption placement preferences in the Indian Child Welfare Act (ICWA). Children's tribe appealed. The Court of Appeals, Huspeni, J., 507 N.W.2d 872, affirmed, and tribe appealed. The Supreme Court Keith, C.J., held that: (1) determination that good cause existed to deviate from ICWA preferences was abuse of discretion, and (2) finding that children had unmet extraordinary emotional needs was not supported by evidence.

Reversed.

Anderson, J., took no part in consideration or decision.

1. Indians 6(2)

Supremacy clause, as well as state law, requires that child placement decisions meet the minimum requirements of the Indian Child Welfare Act (ICWA); ICWA creates presumption that placement of Indian children within preferences of the Act is in the best interest of Indian children. U.S.C.A. Const. Art.

6, cl. 2; Indian Child Welfare Act of 1978, §§ 3, 105, 25 U.S.C.A §§ 1902, 1915; M.S.A. § 256F.07, subd. 2.

2. Indians 6(2)

Determination that good cause exists to avoid adoptive placement preferences of Indian Child Welfare Act (ICWA) cannot be based simply on determination that placement outside the preferences would be in child's best interests, but must be based upon finding of one or more factors described in guidelines; best interests of the child standard, by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with values of majority culture. Indian Child Welfare Act of 1978, § 105, 25 U.S.C.A. § 1915.

3. Indians 6(2)

Adoptive placement preference determination under Indian Child Welfare Act (ICWA) will be reversed only if record as whole reveals abuse of discretion or if controlling factual findings are clearly erroneous; considering improper factors or improperly weighing certain factors are issues of law, reviewed de novo. Indian Child Welfare Act of 1978, § 105, 25 U.S.C.A. § 1915.

4. Indians 6(2)

Finding that Native American children's need for permanence alone was extraordinary emotional need and that suitable family for placement must meet that need, was based on improper assumption that only adoption could meet need for permanence of children, and therefore determination that "good cause" existed to avoid adoptive placement preferences of Indian Child Welfare Act (ICWA) based on that finding was abuse of discretion; permanence could be defined differently in Native American cultures, and prevailing social and cultural standards of Indian community was standard to be applied.

Indian Child Welfare Act of 1978, §§ 105, 105(a), 25 U.S.C.A. §§ 1915, 1915(a).

5. Indians 6(2)

Finding that Native American children possessed extraordinary emotional needs that were not being met in placement under preferences of Indian Child Welfare Act (ICWA) was clearly erroneous; no qualified expert witness testified that children had unmet extraordinary needs, as required by guidelines. Indian Child Welfare Act of 1978, § 105, 25 U.S.C.A § 1915.

Syllabus by the Court

A good cause exception to the placement preferences provision of the Indian Child Welfare Act (ICWA) 25 U.S.C. § 1915 (1988) was not established in this case.

Anita P. Fineday, Tribal Atty., Leech Lake Band of Chippewa Cass Lake, for Leech Lake Band of Chippewa.

Hubert H. Humphrey, III, Atty. Gen., Kim Buechel Mesun, Asst. Atty. Gen., St. Paul, for Commissioner of Human Services.

Timothy R. Faver, Beltrami County Atty., Shari R. Schluchter, Asst. Beltrami County Atty., Bemidji, for Beltrami County.

Charles R. Powell, Powell & Lang, Bemidji, for Guardian ad Litem.

Wright S. Walling, Jody Ollyver DeSmidt, Gary A. Debele, Walling & Berg, Minneapolis, for Eugene Campbell, et al.

Shirley M. Cain, Duluth, for amicus curiae, Red Lake Band of Chippewa Indian.

Jeannice M. Reding, Best & Flanagan, Minneapolis, and James Genia, Sol. Gen., Mille Lacs Band of Ojibwe, Onamia, and Steve C. Moore, Native American Rights Fund, Boulder, CO, for amici curiae, Mille Lacs Band of Ojibwe and Minnesota Chippewa Tribe.

William R. Kennedy, Hennepin County Public Defender, Peter W. Gorman, Asst. Public Defender, Minneapolis, for amici curiae, Hennepin County Public Defender.

Katie Trotzky, Amy Jane Goetz, Legal Aid Soc. of Minnesota, Minneapolis, for amici curiae, Upper Midwest American Indian Center.

Mark D. Fiddler, Indian Child Welfare Law Center, Minneapolis, for amici curiae, Minneapolis American Indian Center and Minnesota Indian Women's Resource Center.

Steven Hirsh, Leah J. Carpenter, Anishinabe Legal Services, Cass Lake, for amici curiae, Melvin E. and Audrey J. Goodman.

Heard, considered and decided by the court en banc.

OPINION

KEITH, Chief Justice.

This appeal arises out of a petition by the respondents, non-Indian foster parents, E.C. and C.C., to adopt three Native American children for whom they had provided foster care. At issue is whether the placement preferences provision of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1915 (1988), provides a "good cause" exception for "extraordinary emotional needs" based on a child's need for permanence in the form of adoption; also at issue is whether the record in this case supports the trial court's findings that these children had extraordinary emotional needs and that there was an "unavailability of suitable families for placement" after a diligent search. We hold, while good cause may include a child's need for stability, this is not equivalent to a need to be

adopted. We also hold that, in this case, the record failed to support the trial court's findings that these children have extraordinary emotional needs. We therefore reverse.

I

In 1978, Congress enacted the ICWA to prevent the destruction of Indian families by reducing removal of Indian children from their communities and to relieve the difficulties experienced by Indian children raised in non-Indian homes by providing preferences for placements within Indian communities. Testimony before Congress indicated there were wide-spread abuses in the placement of Indian children by courts and welfare agencies in states with Indian populations.

One important way in which the Act achieves its goals is by granting to tribal courts exclusive jurisdiction over child custody proceedings involving Indian children living within the reservation, and by providing for transfer of jurisdiction to the tribe, absent good cause to the contrary, of child custody proceedings involving Indian children living off the reservation. 25 U.S.C. § 1911(a), (b). In interpreting this provision, the United States Supreme Court noted, "It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-a-vis state authorities." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44-45, 109 S.Ct. 1597, 1606, 104 L.Ed.2d 29 (1989). The Court concluded, "Indeed the congressional findings that are a part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct." *Id.* at 45, 109 S.Ct. at 1606 (citation and footnote omitted).

The substantive provisions of the Act include § 1915(a), the provision at issue in this case, which sets forth the adoptive placement preferences.[6] Other requirements include: the tribes' right to intervene in and be notified of custody proceedings involving Native American children, 25 U.S.C. §§ 1911(c) and 1912(a); higher standards of proof to remove Native American children and to terminate Native Americans' parental rights, § 1912(e), (f); a requirement that Native American children be returned to their parent upon the parent's revocation of consent to placement or to voluntary relinquishment of parental rights, § 1913(b), (c); and a provision that Native American parents or tribes may petition to vacate any action involving custody of a Native American child upon a showing that the action violated the Act, § 1914.

As the Supreme Court has stated:

> The ICWA thus, in the words of the House Report accompanying it, "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," and by making sure that Indian child welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family."

Mississippi Band of Choctaw Indians, 490 U.S. at 37, 109 S.Ct. at 1602 (citations and footnote omitted).

---

[6] *Placement of Indian children. (a) Adoptive placements; preferences.* In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. 25 U.S.C. § 1915.

II

The parents of the children whose placement is at issue in this case are a Chippewa woman and a white man. S.E.G., the oldest child, was born in 1984; A.L.W. was born in 1985 and V.M.G. in 1987. The factors leading to the family's involvement with the child welfare system are not entirely clear from the record. A.L.W. was first placed out of the home for "failure to thrive" in January, 1986. She was moved to a relative's home in September of 1986 and returned to her mother in December, 1986. The family was apparently still being supervised by Cass County when they moved out of Minnesota in violation of a court order. When the family returned to Minnesota, the children lived at the home of their maternal grandmother.

After V.M.G. was born, the mother was unable to care for them and voluntarily placed all three children in foster care. The children have not lived with their parents since February, 1988. A.L.W. and V.M.G. were moved six times—and S.E.G. five—in the next three years, before being placed in E.C. and C.C.'s therapeutic (PATH) foster home in August, 1991. E.C. and C.C. are a non-Indian couple.

The children remained in E.C. and C.C.'s home until January 29, 1992 when they were placed in a Native American pre-adoptive home. Though discussed in advance, the children's move was not well planned and occurred without prior overnight visits. The placement lasted only nine days, after which the children were returned to E.C. and C.C.'s foster home.

On October 8, 1992, the children were placed in a Native American PATH home in Minneapolis. They moved from that placement within two months because the foster mother was "emotionally not ready to handle the children." The children were then placed in A.C.'s Native American PATH home in

Cloquet, Minnesota, where they have resided since November 13, 1992.

When the children were being placed through PATH, S.E.G. and A.L.W. were identified as having "special needs" and were evaluated by therapists. V.M.G. was evaluated and did not turn out to have any particular special needs, though her therapist recommended that she be placed in a "secure, consistent environment for the long-term."

S.E.G.'s special needs consisted primarily of a language disorder and behavioral problems. In the therapist's opinion, S.E.G. had not bonded with E.C. and C.C. when she was removed, but she was in the process of bonding with them. The therapist believed S.E.G. could achieve a sense of belonging or permanence with an attachment to her tribe "if that's an ongoing part of her life." Finally, the therapist stated that she believed S.E.G. needed to be in a permanent placement and "the sooner the better." In school, S.E.G. was in regular classrooms but required some special education services in speech, cognitive, and social skills.

A.L.W.'s special needs were the most extensive. She exhibited inappropriate sexual acting out behavior, "low intellectual functioning," and speech difficulties. A.L.W.'s school identified her as having a handicapping condition and as being in need of special education services. A.L.W.'s therapist noted she had "some inappropriate ways of expressing anger" and that she had "barrier and boundary issues, interpersonal distancing." One of A.L.W.'s foster mothers filled out forms regarding her skills and development, and from these the therapist determined that A.L.W. was "far below age-level." The therapist recommended "that [A.L.W.] be continued in her EBD [emotional behavior disorders] placement along with seeking some individual counseling with a therapist who specializes in children's emotional problems. Additionally, placement in a home environment that emphasizes consistency

and nurturance along with the knowledge of the dynamics of sexual abuse victimization would be extremely helpful."

Expert and lay witnesses from both sides testified that the children had a strong need for stability in their home environment. All of the witnesses for the Leech Lake Band of Chippewa were recognized as "qualified expert witnesses" by the trial court. E.C. and C.C. presented two witnesses whom the trial court recognized as "qualified Indian experts." All the testimony seemed to show that E.C. and C.C.'s foster home and A.C.'s Native American foster home each provided for the children's physical, emotional, and intellectual needs, but the witnesses disagreed about whether E.C. and C.C. provided for—or could provide for—the children's cultural needs and whether A.C. provided for the children's need for permanence.

Several of the experts identified as "qualified Indian experts" by the trial court testified that Native American children who grow up in non-Native homes suffer from intense identity crises in adolescence. E.C. and C.C.'s friend from church—a white woman married to a Native American man-was qualified as an expert. She testified that she did not observe that traditional Indian parenting techniques were common on the Red Lake Reservation and that she believed the children were bonded and attached to E.C. and C.C. Darrell Auginash, a Native American man who lives and works as a counselor on the Red Lake Reservation, was also qualified as an expert. He testified that he would be willing to work with E.C. and C.C. to educate the children about their culture if E.C. and C.C. were allowed to adopt. He also testified:

> I think as far as identity is concerned, I think that usually comes a little later. The most important thing that most children are concerned about is their, is their security, their, their home, their structure and the love that's provided for them by their family and people like

> that. And the ones that experience the most dysfunction, have a high percentage rates of some of the problems like suicide and alcoholism and drug abuse, delinquency.

When asked whether, in his opinion, cultural identity could be taught to and understood by a child who did not live in a Native American home or on a reservation, he testified: "I believe that as far as this heritage and this culture is concerned, I think that you can learn it just as well in an urban setting or off the reservation * * *. You learn it where you're at with whomever. And I can take it anywhere and teach it."

E.C. testified that he was unable to describe the difference between the Leech Lake Band of Chippewa and the Minnesota Chippewa Tribe and could not identify the clan of which the children were members. He testified that he tried to learn as much as possible about Native American culture through his friendships with Native Americans and by reading Native American publications. E.C. and C.C. clearly made efforts to expose the children to Native American cultural events; they attended two powwows, a few storytellings and arranged a naming ceremony for S.E.G. at the suggestion of a social worker.

All of the social workers and therapists involved with the family in the A.C. foster home noted that the children had "identity issues" related to their Native American heritage and that these issues showed improvement in A.C.'s care. S.E.G.'s therapist—when S.E.G. was in E.C.'s and C.C.'s home—testified that S.E.G. seemed to be confused about the fact that E.C. and C.C. could not keep her because she was Native American and they were white. She noted that S.E.G. hoped E.C. and C.C. would "fight for her."

Finally, all three Native American social workers—each of whom was qualified as an Indian expert by the trial court—stated that the most important thing for the children at that time was that they "stabilize" in the current home. Fred

Isham, a foster care adoption worker with the Minnesota Chippewa Tribe Human Services Division, testified that he was "actively recruiting an adoptive home for the [children]," but that they were not ready for adoption at that time. It seemed clear from the testimony that the workers not only expected the children to remain in A.C.'s home for an unspecified period of time until they "stabilized" but also expected they eventually would be moved to an adoptive home.

Based upon all of the above evidence and the guardian ad litem's recommendation,[7] the trial court held that good cause existed to place the children in a manner inconsistent with § 1915(a). The court held that the children had "extraordinary physical and emotional needs" and that those needs had been established by the testimony of "several qualified experts." The court also held that a suitable family for adoption was unavailable after a diligent search had been completed. The trial court ordered that E.C. and C.C.'s petition for adoption be allowed on May 20, 1993. The court of appeals affirmed on November 16, 1993. *In Re S.E.G., A.L.W. and V.M.G.*, 507 N.W.2d 872 (Minn.App.1993).

III

The issue presented by this case is whether there is good cause not to follow the preference provisions of § 1915(a). Nothing in the ICWA or its legislative history suggests a

---

[7] The guardian ad litem was a junior at Bemidji State University working on a social work degree. She attended guardian ad litem training and had acted as a guardian in roughly 10-12 cases. She is also Native American. Neither party moved to have her qualified as an expert witness.

definition of good cause or describes the factors to be considered in determining whether it exists.[8]

The BIA guidelines, however, offer some structure to state courts interpreting this provision. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67,584-67,595 (1979). Section F.3 of the guidelines describes circumstances which create "good cause" to modify the placement preferences of the Act:

F.3. Good Cause To Modify Preferences

(a) For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:

(i) The request of the biological parents or the child when the child is of sufficient age.

(ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.

(iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

(b) The burden of establishing the existence of good cause not to follow the order of preferences established in subsection (b) shall be on the party urging that the preferences not be followed.

Id. at 67,594. The guidelines also state, however, that Congress intended to give state courts some discretion in these cases:

> Primary responsibility for interpreting other language used in the Act, however, rests with the courts that decide

---

[8] Subsection (c) notes: "Where appropriate, the preference of the Indian child or parent shall be considered * * *." 25 U.S.C. § 1915(c). This suggests that the parents' or child's preferences may constitute good cause.

> Indian child custody cases. *For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child.*[9]

Id. at 67,584 (emphasis added).

[1] The Supremacy Clause, as well as state law, requires that placement decisions in Minnesota courts meet the "minimum" requirements of ICWA. *See* U.S. Const. art. VI; 25 U.S.C. § 1902; Minn.Stat § 256F.07, subd. 2 (1992). Since long before the passage of the ICWA, child custody cases have been decided pursuant to the "best interests of the child" standard. *Eg., State ex rel. Jaroszewski v. Prestidge,* 249 Minn. 80, 81 N.W.2d 705 (1957). ICWA appears to create a presumption that placement of Indian children within the preferences of the Act is in the best interests of Indian children.[10]

At least two courts which have interpreted the "good cause" exception of § 1915 have determined that courts may consider the best interests of the child in determining whether the exception applies. In *Matter of Adop*tion *of F.H.*, 851 P.2d 1361 (Alaska 1993), the Supreme Court of Alaska stated: "Whether there is good cause to deviate in a particular case depends on many factors including, but not necessarily limited to, the best interests of the child, the wishes of the biological parents, the suitability of persons preferred for

---

[9] This section of the guidelines cites to S.Rep. No. 597, 95th Cong., 1st Sess. 17 (1977). The Senate Report is actually referring to the phrase "good cause" in a section of the bill equivalent to § 1911. *Id.* at 5, 17. The BIA's statement seems reasonably applied to both sections of the Act, however.

[10] Section 1902 of the ICWA says simply, "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children * * *." 25 U.S.C. § 1902.

placement and the child's ties to the tribe." *Id.* at 1363-64. Similarly, in *Adoption of M.*, 66 Wash.App. 475, 832 P.2d 518 (Ct. 1992), the Court of Appeals of Washington noted:

> Good cause is a matter of discretion, and discretion must be exercised in light of many factors. These include but are not necessary limited to the best interests of the child, the wishes of the biological parents, the suitability of persons preferred for placement, the child's ties to the tribe, and the child's ability to make any cultural adjustments necessitated by a particular placement.

Id. 832 P.2d at 522 (citations omitted).

[2] We believe, however, that a finding of good cause cannot be based simply on a determination that placement outside the preferences would be in the child's best interests. The plain language of the Act read as a whole and its legislative history clearly indicate that state courts are a part of the problem the ICWA was intended to remedy. *See Mississippi Band of Choctaw Indians,* 490 U.S. at 44-45, 109 S.Ct. at 1606-07. Furthermore, the report from our own Task Force on Racial Bias in the Judicial System indicates that insensitivity to minority cultures remains a problem in child welfare cases. *See Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, Final Report,* 16 Hamline L.Rev. 477, 624-646 (1993).[11] The best interests of the child standard, by its very nature, requires a subjective evaluation of

---

[11] This report shows that despite the enactment of statutory schemes to prevent placement of minority children outside their communities, these children are still "vastly over-represented within the foster care system." *Id.* at 628. "For Native American children in particular, their over-representation in out-of-home placements exceeded white children by over 10 times." *Id.* at 629 (citing Minnesota Department of Human Services, *Minnesota Minority Foster and Adoptive Care, 1989,* 6 (Jan.1991)).

a multitude of factors, many, if not all of which are imbued with the values of majority culture. It therefore seems "most improbable" that Congress intended to allow state courts to find good cause whenever they determined that a placement outside the preferences of § 1915 was in the Indian child's best interests. *Cf. Mississippi Band of Choctaw Indians*, 490 U.S. at 45, 109 S.Ct. at 1606-07.

Though the BIA guidelines are not binding on the courts, the use of the word "shall" in § F.3(a) strongly suggests that a consideration of whether good cause exists should be limited to the factors described in the guidelines. 44 Fed.Reg. 67,584, 67,594 (1979). We hold, therefore, that a determination that good cause exists to avoid the placement preferences of § 1915 should be based upon a finding of one or more of the factors described in the guidelines.

The trial court found that the children's "need for permanence" was an extraordinary emotional need and that no suitable family was available for placement after a diligent search had been completed. Because these two factors are mentioned in the guidelines, we must carefully review the trial court's findings to determine whether they were adequately supported by the record.

[3] Cases from other states hold that an "abuse of discretion" or "clearly erroneous" standard applies to trial court's findings of "good cause." *Matter of Adoption of F.H.*, 851 P.2d 1361, 1363 (Alaska 1993); *Adoption of M.*, 66 Wash.App. 475, 832 P.2d 518, 522 (Ct.1992). We agree with the Alaska Supreme Court's approach in *Matter of Adop*tion *of F.H.:*

> We will reverse an adoptive placement preference determination only if convinced that the record as a whole reveals an abuse of discretion or if controlling factual findings are clearly erroneous. Abuse of discretion is established if the superior court considered improper

factors or improperly weighted certain factors in making its determination.

851 P.2d at 1363. We will not reverse findings of fact unless clearly erroneous. "Considering improper factors" or "improperly weighing certain factors" are issues of law, however, which we will review de novo.

In light of the Act, its legislative history, the BIA guidelines and their commentary, it does not seem that a need for permanence or stability cannot be considered in determining whether good cause exists in a particular case. The Supreme Court of Alaska, in *Matter of Adoption of F.H.*, 851 P.2d 1361, 1365 (Alaska 1993) seemed to assume that adoption was the only possible permanent placement available to the child. *Id.* at 1365. The Alaska Supreme Court noted that "F.H.'s *situation would be uncertain*" if the white foster parents were not allowed to adopt. *Id.* at 1365. In that case, however, F.H.'s natural mother had voluntarily relinquished her parental rights conditioned on the foster parents' adoption. *Id.* The court noted that the natural mother and foster parents had agreed to an open adoption, the natural mother testified that she could more easily visit F.H. in the foster parent's home than in the Native village in which her relatives lived, and the foster mother and F.H. had formed a strong bond. *Id.* This case presents a somewhat different problem, however, in that parental rights have already been terminated and the children would not be subjected to continued attempts at reunification with the biological parents if they were not placed in E.C. and C.C.'s home.

The Commissioner of Human Services argues that the phrase, "unavailability of suitable families for placement" does not refer only to *adoptive* placement. She argues that adoption is not the only permanent placement option, and preferring adoption over other options, such as permanent

foster care, may result in more placements outside Native American communities.

ICWA's § 1915(d) requires that "[t]he standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties." The record of the 1974 United States Senate Hearings supports the Leech Lake Band of Chippewa's claim that permanency is defined differently in Native American cultures. At least one witness before the trial court testified that she believed S.E.G.'s need for permanence could be met through an attachment to her tribe "if that's an ongoing part of her life." The House Report published with the passage of ICWA in 1978 notes: "For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family." H.R.Rep. No. 1386, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532. Finally, as the report of the Task Force on Racial Bias noted regarding application of ICWA in Minnesota: "Problems can arise when a system that is largely white, with middle-class values, is called upon to evaluate cultural and racial norms which are neither white nor necessarily middle-class." *Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, Final Report,* 16 Hamline L.Rev. 477, 631 (1993). Given that a need for permanence is not discussed in the Act or its regulations, it is important that this need not be defined so narrowly as to threaten or substantially reduce placements in Native American homes. *See* 44 Fed.Reg. 67,586 (1979).

[4] Here the trial court found that the children had extraordinary emotional needs but went on to find the present emotional, cultural, educational, and physical needs of the

children are currently being met in the home of A.C., except for the need for permanence. In effect, the trial court found that the need for permanence alone was an extraordinary emotional need and that a suitable family for placement must be a family that could meet this need. Implicit in the trial court's findings that the children's need for permanence was not being met at A.C.'s foster home and that A.C.'s home was not a suitable family for placement was an assumption that only adoption could meet a need for permanence. We believe this holding was based on the improper assumption that the need for permanence could only be met through adoption and, therefore, we reverse this holding as a matter of law.

The trial court also found that the children did have extraordinary emotional needs, but found that all of those needs, but the need for permanence, had been met in A.C.'s foster home.

The BIA guidelines require that a finding of extraordinary physical or emotional needs be "established by testimony of a qualified expert witness."[12] Section D.4 of the BIA guidelines addresses the use of the phrase "qualified expert witness" in the Act. Subsection (b) of this section states:

> (b) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

---

12 The commentary to the section of the guidelines discussing "extraordinary emotional needs" states: "In a few cases a child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live. Paragraph (ii) recommends that such considerations be considered as good cause to the contrary." 44 Fed. Reg. 67,585, 67,594 (1979). This commentary suggests a narrower spectrum of "extraordinary physical or emotional need" than the guidelines. Our decision regarding qualified expert witnesses makes it unnecessary to decide to what degree the commentary may narrow the definition of extraordinary emotional need.

(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(iii) A professional person having substantial education and experience in the area of his or her specialty.

44 Fed.Reg. 67,584, 67,593 (1979). The comments to this section of the guidelines state, "The second subsection makes clear that knowledge of tribal culture and childrearing practices will frequently be very valuable to the court." *Id.* In Minnesota, it is important to read this section of the guidelines in conjunction with § A.(2), which states:

(2) In any child custody proceeding where applicable state or other federal law provides a higher standard of protection to the rights of the parent or non custodian than the protection accorded under the Indian Child Welfare Act, the state court shall apply the state or other federal law, provided that application of that law does not infringe any right accorded by the Indian Child Welfare Act to an Indian tribe or child.

Id. at 67,586. The Minnesota Department of Human Services Social Services Manual defines a qualified expert witness somewhat more narrowly, requiring expertise about Indian childrearing practices in all three categories. *See* Minnesota Department of Human Services, *Minnesota Social Services Manual,* XIII-3586 (1987); *Matter of Welfare of B.W.*, 454 N.W.2d 437, 442 (Minn.App. 1990). "The DHS manual *adds* to paragraph (iii) the requirement that the professional have 'substantial knowledge of prevailing social and cultural

standards and child-rearing practices within the Indian community.'" *Matter of Welfare of B.W.*, 454 N.W.2d at 442.

[5] Most of the testimony in this case which tended to establish that the children had extraordinary physical or emotional needs was not presented by qualified expert witnesses. E.C. and C.C. presented only two witnesses whom they attempted to qualify as expert witnesses. By contrast, nearly all of the tribe's expert witnesses qualified under the guidelines and were found to so qualify by the trial court.

The record before the trial court supported its finding that both families adequately met the children's emotional, educational, and physical needs. By all accounts, the children generally had fared very well in E.C. and C.C.'s home, and neither party disputed that they currently were doing well in A.C.'s home. However, the *qualified expert witness* portion of the record seemed to show that the placement in A.C.'s home met the children's cultural needs and that it was unlikely E.C. and C.C. would have been able to meet those needs as well as A.C., though E.C. and C.C. certainly showed they would make efforts to do so. Only one qualified expert witness, Darrell Auginash, testified that he believed it was "possible" for the children's cultural needs to be met growing up in a non-Native home.[13] Mr. Auginash did not express an opinion as to whether the children had extraordinary emotional needs and he could not have so testified because he had known E.C. and C.C. only a few days at the time of trial.

Of the experts qualified by the trial court, none testified that the children had extraordinary emotional needs which were not being met in their current placement. Rather, these witnesses' testimony tended to show that the children were not ready to be adopted and needed to stabilize before being

---

[13] The second of E.C. and C.C.'s qualified experts was a white woman married to a Native American man who testified that she did not think the "traditional child-rearing practices" were widely used in the Native American community.

placed in an adoptive home and that their need for stability was being met in A.C.'s home. Under these circumstances, we believe that the trial court's finding of extraordinary emotional need could not have been based on the testimony of qualified expert witnesses and was therefore clearly erroneous.

Our decision today is not meant in any way as a criticism of the trial court's handling of the matter. By contrast, it was because that court's careful decisions at trial, which lasted six days, and the court's thorough findings of fact and thoughtful memorandum that we were able to review this case effectively.

Decisions on the custody of children, even when the cultural values of all the participants are similar, are often the most difficult for our trial and appellate judges. These decisions can be even more difficult when children are born into an Indian community which may view the family and tribal community very differently from our majority culture. Congress, in conjunction with numerous Indian tribal governments and the Bureau of Indian Affairs, has carefully and thoughtfully set out the nation's policy to prevent the destruction of Indian families and Indian tribes and to protect the best interests of Indian children by preventing their removal from their communities.

For the reasons set out above, we do not believe the record in this case shows good cause to deviate from the placement preferences of the Indian Child Welfare Act.

Reversed.

ANDERSON, J., took no part in the consideration or decision of this case.

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF BELTRAMI NINTH JUDICIAL DISTRICT
JUVENILE COURT DIVISION

In the Matter of the Petition of:

Court File No. F8-92-1383
F8-92-50552

Eugene C. Campbell, and his wife, Carol E. Campbell, to adopt

Sierra E. Graham, Amber L. Whipple, and Velvet M. Graham.

NOTICE OF MOTION AND MOTION FOR STAY PENDING PETITION TO THE UNITED STATES SUPREME COURT

TO: The Leech Lake Band of Chippewa and their attorney, Anita P. Fineday, R.R. 3, Box 100, Cass Lake, MN 56633; Beltrami County Social Services and its attorney, Shari R. Schluchter, Assistant Beltrami County attorney, 207 4th Street N.W., P.O. Box 1653, Bemidji, MN 56601-1653; Ms. Diane White, Guardian ad Litem, and her attorney, Charles Powell, P.O. Box 908, Bemidji, MN 56601; and Commissioner of Human Service and its attorney, Kim Buechel Mesun, Assistant Attorney General, 445 Minnesota Street, Suite 900 NCL Tower, St. Paul, MN 55104-2127:

PLEASE TAKE NOTICE that the undersigned attorneys, on behalf of Petitioners Eugene and Carol Campbell, do hereby move the court at the earliest possible date and based upon the written submissions of the parties hereto, for an order granting the following relief:

1. Ordering a stay of any proceedings regarding the custody and/or adoption of these children pending the Respondents' Petition to the United States Supreme Court for a Writ of Certiorari to review the Minnesota Supreme Court's decision in this matter dated August 31, 1994;

2. Ordering, that the children continue attending school in Cloquet, Minnesota pending the outcome of this Petition to the United States Supreme Court;

3. That the Respondents, Gene and Carol Campbell, continue to have visitation access with the children as previously ordered in the trial court's Order dated February 25, 1994;

4. For such other and further relief as the court may deem just and equitable.

This Motion shall be based upon the attached Affidavits of Carol Campbell, Katherine R. Bronczyk, Gary A. Debele, the attached Memorandum of Law, and upon all of the files and proceedings herein.

WALLING & BERG, P.A.

Dated: 10/18/94

By: s/ Jody Ollyver DeSmidt
Wright S. Walling (#114030)
Jody Ollyver DeSmidt (#14339X)
Gary A. Debele (#187458)
701 Fourth Avenue South
Suite 650
Minneapolis, MN 55415-1606
(612) 340-1150
Attorneys for Petitioners

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF BELTRAMI NINTH JUDICIAL DISTRICT
JUVENILE COURT DIVISION

In the Matter of the Petition of:

Court File No. F8-92-1383
F8-92-50552

Eugene C. Campbell, and his wife, Carol E. Campbell, to adopt

AFFIDAVIT OF CAROL CAMPBELL

Sierra E. Graham, Amber L. Whipple, and Velvet M. Graham.

STATE OF MINNESOTA)
) ss.
COUNTY OF BELTRAMI)

Carol E. Campbell, being first duly sworn upon oath, deposes and states as follows:

1. That I am one of the Petitioners in the above-entitled matter and make this Affidavit in support of my Motion to Stay the Order of the Minnesota Supreme Court pending our Petition for Writ of Certiorari to the United States Supreme Court.

2. That it is our understanding that at the current time the children have not been placed in a preadoptive placement with anyone and that there are no specific preadoptive homes ready for said placement of the children.

3. That it is our understanding that during the month of August 1994 the children were placed in several different

respite homes. We provided transportation for our August 5 through 7, 1994, visit and picked the children up from a respite provider and returned the girls to the same respite home provider. During our visit of August 19 through 20, 1994, the children were again in a respite provider's home. The volunteer driver on that occasion who picked the children up at the Angelique Coffey home informed us that the girls had been dropped off to meet her there from the home of another respite care provider. At that time it was simply considered a meeting place for the two drivers to meet to exchange the children. It was clear, that the children had not been in the Angelique Coffey home for some period of time.

4. That during our last visit with the children on September 2 through 4, 1994, we again provided the transportation for the visit. My husband and I picked the children up from a respite care provider and returned the to a different respite care provider as we had been directed to do. Through a phone call from Sierra, we have been informed that Angelique Coffey, the foster care provider they had been with for some time is now working in South Dakota and that they are living with someone the children refer to as "Jule."

5. That the children have expressed to us their bewilderment and fear as a result of their recent moves and being cut off from me and my husband. We do not believe it to be in their best interests that they be moved and that any action be taken regarding their placement until such time as this case has been completely resolved.

6. With regard to preadoptive placement, we have been informed that Sierra, Amber and Velvet have had only two visits in the Melvin Goodman home. That though Mr. Goodman had been offered the opportunity for visits every other weekend this past summer of 1994, he specifically chose not to exercise this visitation because he was a pipe carrier and was involved in cultural events.

7. On July 23, 1994, Glenda Duhamel, the tri-county social worker, visited our home for purposes of inspection and visiting with the girls. She informed me that if my husband and I lost the case in the Minnesota Supreme Court, the girls would not be moving immediately to the Melvin Goodman home. She said that there were some issues to resolve and the girls would remain in the Angelique Coffey home until those issues were resolved.

8. However, it is our understanding that the children are not currently in the Angelique Coffey home nor have they been placed in the Melvin Goodman home.

9. It has been and continues to be our belief that the children's best interests are served by continuing contact with us and by remaining in a stable environment pending the resolution of this matter completely.

Dated: October 7, 1994

s/ Carol Campbell
Carol Campbell

Subscribed and sworn to before me
this 7 day of Oct., 1994.

s/Roberta J. Sparby
Notary Public

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF BELTRAMI NINTH JUDICIAL DISTRICT
JUVENILE COURT DIVISION

In the Matter of the Petition of:

Court File No. F8-92-1383
F8-92-50552

Eugene C. Campbell, and his wife, Carol E. Campbell, to adopt

AFFIDAVIT OF GARY A. DEBELE

Sierra E. Graham, Amber L. Whipple, and Velvet M. Graham.

STATE OF MINNESOTA)
) ss.
COUNTY OF BELTRAMI)

Gary A. Debele, being first duly sworn upon oath, deposes and states as follows:

1. That I am one of the attorneys representing the Petitioners in this matter, Eugene and Carol Campbell.

2. The Campbells are requesting from this court a stay and other relief as further outlined in the notice of motion and motion pending their petition to the United States Supreme Court for a Writ of Certiorari to review the Minnesota Supreme Court's decision in this matter dated August 31, 1994.

3. Given that the Supreme Court reversed the Minnesota Court of Appeals and the trial court herein without

any remand, the Campbells submitted a request for a stay to the Minnesota Supreme Court earlier this month.

4. The undersigned was advised on October 17, 1994, by Julie Kurth, a clerk with the Minnesota Supreme Court, that the Minnesota Supreme court no longer had jurisdiction over this matter and that the file had been returned to the trial court, despite the fact that there had been no remand in the Supreme Court's decision.

5. Because of the Minnesota Supreme Court's refusal to address the Campbell's request for a stay pending further review by the United States Supreme Court, they now file this request with the District Court.

FURTHER YOUR AFFIANT SAITH NOT.

Dated: 10-18-94

s/ Gary A. Debele
Gary A. Debele

Subscribed and sworn to before me
this 18th day of October, 1994.

s/Patricia A. Guenther
Notary Public